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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 343

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, APPELLANTS

vs.

FRANK O. LOWDEN, JAMES E. GORMAN, AND JOSEPH B. FLEMING, AS TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

FILED AUGUST 31, 1939

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INDEX

	Original	Print
Record from D. C. U. S., Northern District of Illinois	1	1
Caption [omitted in printing]	1	1
Petition	5	1
Exhibit A—Report of I. C. C., Finance Docket No. 11847; October 29, 1938	17	8
Exhibit B—Report and order of I. C. C. on reargument, Finance Docket No. 11847, April 3, 1939	34	18
Answer of defendant, United States of America	50	26
Answer of Defendant, Interstate Commerce Commission	54	28
Affidavit of W. H. Burns	61	30
Exhibit—Statement showing estimated amounts of dismissal allowances	64	32
Findings of Fact and Conclusions of Law	66	32
Opinion of the Court	74	37
Final Decree	85	43
Petition for Appeal	88	44
Notice of Appeal and Acknowledgment of Service	91	45
Assignment of Errors	95	46
Order Allowing Appeal	99	47
Notice to Attorney General of the State of Illinois	102	48

185647—39——1

	Original	Print
Affidavit of W. H. Burns—Continued.		
Petition for Order Staying Final Decree Pending Appeal	114	48
Answer of Plaintiffs to Petition for Order Staying Final Decree Pending Appeal	119	51
Order Staying Final Decree Pending Appeal	125	54
Praecipe for Transcript of Record and Acknowledgment thereof	128	55
Certificate of Clerk [omitted in printing]	131	56
Citation and Service [omitted in printing]	132	56
Statement of Points to be Relied Upon and Designation of Record to be Printed	134	56

1 [Caption omitted.]

5 IN UNITED STATES DISTRICT COURT, FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 615

FRANK O. LOWDEN, JAMES E. GORMAN, AND JOSEPH B. FLEMING, AS TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY AND AS TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND GULF RAILWAY COMPANY, PLAINTIFFS

vs.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Petition

Filed May 24, 1939

To the Honorable, the Judges of Said District Court:

Your petitioners, Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, as Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company and as Trustees of the Estate of The Chicago, Rock Island and Gulf Railway Company, bring this action against the United States of America and the Interstate Commerce Commission (hereinafter called the "Commission") for the purpose of enjoining, setting aside, and suspending, in part, a certain order of the Commission, entered April 3, 1939, a proceeding entitled,

"Petition of Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees in Reorganization Proceedings of The
6 Chicago, Rock Island and Pacific Railway Company for authority to lease the properties comprising the Estate of The Chicago, Rock Island and Gulf Railway Company; and of Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees in Reorganization Proceedings of The Chicago, Rock Island and Gulf Railway Company to grant said lease," being No. 11847 of the Finance Docket of the Commission.

For their cause of action, petitioners state:

1. The Chicago, Rock Island and Pacific Railway Company is a railroad corporation organized under the laws of the States of Illinois and Iowa, respectively, by articles of consolidation dated June 2, 1880, and renewed May 1, 1930. On June 7, 1933, said corporation filed its petition in the District Court of the United States for the Northern District of Illinois, Eastern Division, pursuant to Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy, and on the same date said Court entered an order approving said petition as properly filed under said Section 77.

The Chicago, Rock Island and Gulf Railway Company is a railroad corporation organized under the laws of the State of Texas. On October 24, 1933, said corporation filed its petition in the District Court of the United States for the Northern District of Illinois, Eastern Division, alleging that its entire capital stock (except directors' shares) having power to vote for the election of directors was owned by said The Chicago, Rock Island and Pacific Railway Company, and that it desired to effect a plan of reorganization in connection with the plan of reorganization of said The Chicago, Rock Island and Pacific Railway Company. By order entered the same day, said Court approved said petition as properly filed under said Section 77.

On November 22, 1933, said Court entered an order in said
7 reorganization proceedings appointing petitioners as Trustees of all and singular the railroads, lands, properties, estates, rights and franchises, of whatever character and wherever situate, of The Chicago, Rock Island and Pacific Railway Company and of The Chicago, Rock Island and Gulf Railway Company, effective December 1, 1933; by order of said Court entered December 28, 1933, the said appointment was made permanent. Petitioners are now, and have been at all times since December 1, 1933, the duly appointed, qualified and acting Trustees of the Estates of the said railroad corporations, respectively, and as such, are and have been at all times engaged in the transportation of freight and passengers for hire in interstate commerce, subject to the Interstate Commerce Act.

Each of the petitioners is a citizen and resident of the State of Illinois. James E. Gorman and Joseph B. Fleming each reside in the City of Chicago, Illinois.

2. The United States of America is made defendant in this suit pursuant to the provisions of the Act of Congress approved October 22, 1913 (38 Stat. at L. 219), known as "Urgent Deficiencies Appropriation Act."

2. The Commission is an administrative tribunal, created by the Act to Regulate Commerce (24 Stat. at L. 379), approved February 24, 1887, as amended (the Interstate Commerce Act), and is specifically charged with the administration and the enforcement of said Act.

4. On or about October 30, 1937, petitioners filed with the Secretary of the Commission, Washington, D. C., their application to the Commission for authority under par. (4) of Section 5 of the Interstate Commerce Act, as Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, to lease the properties com-
prising the Estate of The Chicago, Rock Island and Gulf
8 Railway Company, and for authority, as Trustees of the Estate of The Chicago, Rock Island and Gulf Railway Company, to grant said lease, all upon the terms, conditions, and provisions set forth in the draft of lease attached to and made a part of said application. Said application was received and filed by the

Commission and was numbered 11847 on its Finance Docket. Thereafter, on January 19, 1938, the Commission held a hearing at Fort Worth, Texas, upon said application.

5. Said proceeding was thereafter heard by and submitted to Division Four of the Commission, which, by report dated October 29, 1938, found that the proposed lease will be in harmony with and in furtherance of the Commission's plan for the consolidation of railroad properties, and will promote the public interest, upon the terms and conditions proposed in said report (a copy of which is filed herewith, marked "Exhibit A" and made a part hereof). Said report contained the following:

"No order will be entered approving and authorizing the lease pending notice to us that the applicants accept the foregoing conditions."

6. Thereafter, petitioners sought for and obtained a rehearing and reargument before the entire Commission, and on April 3, 1939, the Commission issued its report and entered an order approving and authorizing said lease, upon the terms and conditions set forth in said lease, but only upon the conditions prescribed in the said report of Division Four of the Commission, dated October 29, 1938, in said proceeding and contained in paragraphs numbered 1, 2, 3, 4, of said report (a copy of which report and order of April 3, 1939, is filed herewith, marked "Exhibit B" and made a part hereof).

7. Petitioners are informed and believe that each and every of the conditions prescribed in said report of Divison Four of the
9 Commission, dated October 29, 1938, and referred to and adopted by the Commission in said order entered April 3, 1939, are void and beyond the power and authority of the Commission to impose. Petoitioners are advised and believe that the Commission is without power or authority to impose conditions of the kind and nature of those prescribed in its said order and is without power, in approving and authorizing a lease of railroad properties by one carrier subject to the Interstate Commerce Act to another carrier likewise subject, to require said carriers, or either of them, to pay money to employees to reimburse them for financial loss, in whole or in part, suffered as a consequence of or arising from the consummation of such lease.

8. Petitioners allege that the subject-matter of the said conditions is not one in respect of commerce, and that said conditions, and the obligations attempted to be imposed thereby upon petitioners, are without the grant of authority to regulate interstate and foreign commerce contained in Article I, Section 8, of the Constitution of the United States. Petitioners further allege that the said conditions and the obligations attempted to be imposed upon petitioners thereby, deprive petitioners of their property without due process of law contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

9. Petitioners allege that as a result of operation under said lease, there are approximately 53 employees whose positions would be lost or abolished; that if each of such employees retained the status entitling him to a dismissal allowance for the full period of payment and in the full amount prescribed in said conditions, petitioners would be required to pay from the funds of the several Estates
10 of which they are Trustees as aforesaid, on account of such dismissal allowance, not less than the following amounts:

First Year	$61,645
Second Year	59,178
Third Year	59,178
Fourth Year	58,082
Fifth Year	42,675
	$280,758

Petitioners are unable to arrive at an exact estimate of the total cost of compliance with those of said conditions which require, as respects employees who are continued in service after commencement of operation under the said lease, (1) that no such employee be placed in a worse position with respect to compensation and rules governing working conditions than he occupied at the date of commencement of operation under the lease; (2) reimbursement for expenses of a transferred employee moving his household and other personal effects, for traveling expenses of himself and immediate family, and his actual wage loss (not exceeding 2 days) while moving; and (3) protection of a transferred employee against any loss suffered in the sale of his home, or in securing cancellation of an unexpired lease of a dwelling occupied by him as a home. Petitioners allege, upon information and belief, that the total cost of compliance with said conditions would be no less than $10,000.

10. Petitioners allege that the said lease and the operation of the railways covered thereby in accordance with the terms thereof will be beneficial to the Estates of which petitioners are Trustees as aforesaid, in that such lease operations will obviate the necessity for expenditures which have been and which must otherwise continue to be made, to an amount in excess of $100,000 per year; that said expenditures are excessive, are not in the public interest, and are a
11 burden upon interstate commerce. That said excessive expenditures are required under the present plan of separate operation of the properties comprising the Estate of The Chicago, Rock Island and Gulf Railway Company in accordance with the laws of the State of Texas. Petitioners desire, therefore, to make and enter into the said lease and to operate the leased properties as therein provided in order to obtain the benefits accruing therefrom to the said Estates. The Interstate Commerce Act provides, by Section 10 thereof, that any trustee acting for a common carrier corporation which is subject to the provisions of Part I of said Act, who shall willfully do or cause to be done, or shall willfully suffer or permit to be done, any act, matter, or thing in said Part I prohibited or

declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in said Part required to be done, or shall be guilty of any infraction of said Part I for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor and shall upon conviction thereof be subject to a fine of not to exceed $5,000 for each offense. That by Sec. 12 of said Part I, the Commission is authorized and required to execute and enforce the provisions of said Part I, and, upon the Commission's request, it is the duty of any district attorney of the United States to whom the Commission may apply, to institute and prosecute all necessary proceedings for the enforcement of the provisions of said Part I and for the punishment for all violations thereof.

The State of Texas, acting by and through its Attorney General, was allowed by the Commission to intervene in said proceeding in said Finance Docket 11847, and appeared at said hearing upon the application therein, and thereafter participated by exceptions, brief, and oral argument in opposition to the granting of the
12 application, contending that the making of the lease and operations thereunder would be contrary to the interests of the State of Texas and to its Constitution and statutes.

The Constitution of the State of Texas, by Article X, Sec. 6, provides:

"No railroad company organized under the laws of this State shall consolidate by private or judicial sale, or otherwise, with any railroad company organized under the laws of any other state or of the United States."

The Statutes of the State of Texas relating to permission to transact business in the State of Texas by any corporation organized or created under the laws of any other State (being Chapter 19 of Vernon's Texas Statutes, 1936), provide:

"ART. 1538. The provisions of this chapter shall not apply to corporations created for the purpose of constructing, building, operating, or maintaining any railway * * *."

Such statutes further provide (Ibid., Title 112—Railroads, Chap. 2, Art. 6278):

"Railroad companies shall keep and maintain at the place within this State where its general offices are located the office of its president, or vice president, secretary, treasurer, local treasurer, auditor, general freight agent, traffic manager, general manager, general superintendent, general passenger and ticket agent, chief engineer, superintendent of motive power and machinery, master mechanic, master of transportation, fuel agent, general claim agent; and each one of its general offices shall be so kept and maintained by whatever name it is known, and the persons who perform the duties of said general offices, by whatever name known, shall keep and maintain their offices at the place where said general offices are required to be located and maintained; and the persons holding said general offices shall

reside at the place and keep and maintain their offices at the place where said general offices are required by law to kept and
13 maintained. If the duties of any of the above-named offices are performed by any person, but his position is called by a different name, said railroad company shall maintain said offices at the place where its general Texas offices are kept and maintained, as required by this chapter. The name of the general offices shall not be understood to allow the railroad company to have any of the offices usually known as general offices at any other place than the one at which it is required to keep its general offices; and each railroad is hereby required to have and maintain its general offices at the place named herein. Where the principal shops of a company are situated on its line in the State, at a place other than where its general offices are located, the superintendent of motive power and machinery, master mechanic, either or both, may have his office and residence at such place where such principal shops are located; provided, that the Railroad Commission of Texas, where it is made to appear that any officer, other than the general officers of any company, can more conveniently perform his duties by residing at some place on the line in Texas other than the place where the general offices are situated, may by an order entered on its record, authorize any such officer to so reside and keep his office at such place.

"ART. 6279. Forfeiture. Each railroad company chartered by this State, or owning, operating, or controlling any line of railroad within this State, which shall violate any provision of this chapter, shall forfeit the charter by which it operates its railroad in Texas to the State of Texas. The Attorney General shall, upon the application of an interested party, or on his own motion, proceed at once against every offending railroad company owning, operating, or controlling any line of railway within this State and violating any provision of this law, by quo warranto to forfeit the charter of such railroad company. In addition to forfeiting the charter to that part of the railroad situated within this State, such offending railroad company shall be subject to a penalty of five thousand dollars for each day it violates any provision of this chapter; such penalty to be recovered by suit in the name of the State of Texas to be
14 filed by the Attorney General. Any money recovered from any railroad company under the provisions of this law shall be paid into the State Treasury and become a part of the available public free school fund. A judgment of the court forfeiting the charter of a railroad company shall allow six months from the date of the judgment within which to comply with this law, and if it shall comply within said time no forfeiture shall occur; but if it fails to so comply, then the judgment shall be final."

Petitioners allege that if said lease is entered into and the leased properties operated pursuant thereto, but without compliance by petitioners with the conditions prescribed in said order of the Commission, petitioners will be exposed to the hazard (1) of having

criminal or civil proceedings instituted against them for violation of the Interstate Commerce Act or for violation of the Commission's said order of April 3, 1939; (2) of the forfeitures and penalties provided for in and by said statutes of the State of Texas for alleged violation thereof; and (3) to numerous actions at law by various persons claiming the benefit of the said conditions, to recover various amounts of money alleged to be due and owing to them, respectively, by virtue of the terms and provisions of said conditions.

11. In the premises, petitioners have no adequate remedy at law, and unless the relief prayed for herein, including the issuance of an interlocutory or temporary injunction be granted herein to petitioners, they will suffer, for the reasons and in the manner stated in this petition, irreparable injury and damage.

Wherefore, your petitioners pray:

1. That a subpoena or subpoenas in chancery issue out of and under the seal of this Honorable Court, directed to the defendants, as required by law, and that due and proper service of such process and of this petition be forthwith made by filing a copy thereof in the office of the Secretary of the Commission, and another copy in the Department of Justice, and that thereby the defendants and each of them be required, on or before a date to be specified in such subpoena or notice, to appear herein and answer this petition, but not under oath, answer under oath being hereby expressly waived.

2. That the defendants, their officers, agents and attorneys, be perpetually restrained and enjoined from enforcing, or attempting to enforce, the said order entered April 3, 1939, by the institution of civil or criminal proceedings against the petitioners by reason of the nonpayment by petitioners, after said lease shall have been entered into by them and operations begun thereunder, of any of the sums designated as compensation, dismissal allowance, reimbursement for moving expenses, losses from sales of homes and cancellation of leases, and any and all other such amounts of whatsoever nature, specified in said conditions.

3. That after final hearing, this Court find, adjudge, order and decree that the part of said order entered April 3, 1939, which adopts, refers to, and incorporates the conditions prescribed in the report of division 4 of the Commission, dated October 29, 1938, and set forth at length in said report in paragraphs numbered 1, 2, 3, and 4 thereof, is, and has at all times been, beyond the lawful authority of the Commission and wholly void, and that the said part be perpetually set aside, suspended and annulled, and the enforcement thereof perpetually enjoined.

4. That a temporary or interlocutory injunction be entered herein, restraining, enjoining, and suspending the enforcement of so much of said order of the Commission as is specified in par. 3, until the further order of this Court.

16 5. That your petitioners may have such other and further relief in the premises as justice and equity may require, and as may be deemed by this Honorable Court to be adequate and proper under the circumstances.

FRANK O. LOWDEN,
JAMES E. GORMAN,
JOSEPH B. FLEMING,
Trustees as aforesaid,
By JOSEPH B. FLEMING,
One of said Trustees.

OTIS F. GLENN,
M. L. BELL,
W. F. DICKINSON,
W. F. PETER,
Solicitors for petitioners.
W. F. PETER,
1025 La Salle St. Station, Chicago,
Tel. Wabash 3200.

[*Duly sworn to by Joseph B. Fleming; jurat omitted in printing.*]

17 *Exhibit A to petition*

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 11847. Chicago, Rock Island & Gulf Railway Company Trustees Lease

Submitted June 28, 1938. Decided October 29, 1938

Lease by Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, as trustees of the Chicago, Rock Island & Pacific Railway Company, of the properties of the Chicago, Rock Island & Gulf Railway Company, of which they are also trustees, approved and authorized, upon prescribed conditions. Order withheld.

Marcus L. Bell, W. F. Peter, and Robert Harrison for applicants.

William McCraw, Sam Lane, W. M. Hill, James H. Baker, Ed. P. Byars, E. G. Graves, R. B. Young, Horace A. Bacus, J. Y. McLean, Ezra Brainerd, Jr., and Joe T. Steadham for interveners.

REPORT OF THE COMMISSION—DIVISION 4, COMMISSIONERS MEYER, PORTER, AND MAHAFFIE

By Division 4:

Exceptions to the report proposed by the examiner were filed, and oral argument heard.

In Rock Island System Consolidation, 193 I. C. C. 395, decided August 9, 1933, we conditionally found to be in the public interest the merger of the properties of the Chicago, Rock Island and

18 Pacific Railway Company, nine nonoperating subsidiary cor-

porations, and two operating corporations, one of the latter being the Chicago, Rock Island & Gulf Railway Company. The entering of an order was withheld to permit acceptance of the condition imposed, which was not accepted, and the merger was not effected.

On December 31, 1935, Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, trustees in reorganization proceedings of the estates of The Chicago, Rock Island and Pacific Railway Company and of The Chicago, Rock Island and Gulf Railway Company, hereinafter sometimes referred to as the Rock Island and the Gulf, respectively, applied under section 5 (4) of the Interstate Commerce Act, as amended, for authority to merge operation of the railway properties included in the two estates. By decision of July 19, 1937, Chicago, R. I. & P. Ry. Co. Trustees Merger of Operation, 221 I. C. C. 611, we held that the application was not within the provisions of section 5 (4) and accordingly dismissed it.

On November 8, 1937, the trustees applied for authority under section 5 (4) to lease the properties of the Gulf and as trustees of the Rock Island to enter into and accept such lease. A hearing has been held. The State of Texas, by its attorney general and its Bureau of Labor Statistics, the city of Fort Worth, commercial interests of that community, the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees, and the Transportation Brotherhoods (engineers, firemen, conductors, and trainmen) intervened in opposition to the application on the grounds that they will be detrimentally affected by the approval of the lease in that such approval will result in the removal to Chicago,
19 Ill., of a substantial portion of the general offices of the Gulf at Fort Worth, and that such removal would be an indirect violation of articles 6275 and 6276 of the Revised Civil Statutes of Texas, 1925. Individuals constituting a protective committee representing holders of various bond issues of the Rock Island also intervened, but were not represented at the hearing.

The Rock Island owns all of the Gulf's outstanding capital stock and, subject to pledge, all its outstanding bonds. The latter's properties are located entirely in the State of Texas and are separately operated. The Rock Island operates 8,138 miles of railroad and the Gulf 632 miles. The purpose of the lease is to combine the operations of the two carriers. Gulf lines form parts of the Rock Island's through routes as follows: About 91 miles of the route extending from Chicago, Ill., through Kansas City, Mo., to Tucumcari, N. Mex.; about 180 miles of the Memphis-Kansas City, Tucumcari route; and part of the through route from Kansas City to Fort Worth and Dallas, Tex. Train operations are conducted irrespective of State boundary lines. The train operations limited to the State of Texas are said to be very few. No change in train operations is herein involved. Operation by the Rock Island under the proposed lease will not impose upon the public any conditions pertaining to trans-

portation of freight different from those now in effect, will result in no change in service to the public, and will have no effect upon rates or routes. Divisions from foreign lines are now settled with both the Rock Island and Gulf, whereas if the Rock Island operates both lines foreign lines will be required to make only one settlement.

The only change which will be effected, if the lease be approved, will be in the accounting department of the Gulf at Fort Worth.

The applicants show that duplication of accounting could be
20 eliminated in connection with interline and foreign freight, equipment rents and repairs, purchase of company material, pay rolls, and to a minor extent in connection with passenger traffic, and that unified operation as proposed would permit discontinuance of the compilation of separate statistics and the making of separate reports. This change would be brought about by the transfer of 20 employees from Fort Worth to the accounting department of the Rock Island at Chicago, and the dismissal of 49 employees, unless business increased sufficiently to warrant the retention of a greater number of men, resulting in an estimated annual saving of $100,000, of which $93,000 or $7,000 would accrue to the Gulf and the remainder to the Rock Island. On argument counsel for the applicants stated that since the hearing in this case, it has been determined that the 20 employees referred to will be retained at Fort Worth for the present. The estimate does not include a possible saving of $5,925 for office rent at Fort Worth, which is dependent upon whether the vacated office space can be sublet. The general officers of the Gulf will continue to represent Rock Island interests but as officers of the Rock Island, and as at present some of them will have jurisdiction of Rock Island lines outside of the State of Texas. The testimony is that no saving could be effected except by the dismissal and transfer of employees involved.

The Gulf trustees, subject to the approval of the Commission, propose to lease the Gulf properties to themselves as Rock Island trustees until the termination of the proceedings under section 77 of the Bankruptcy Act of either the Gulf or the Rock Island. The Rock Island is to pay the Gulf as rental for the latter's properties
an amount equal to the net railway operating income derived
21 from the operation by the lessee of the leased properties, as the net railway operating income shall be determined in accordance with the formula attached to the lease; payments are to be made monthly; the lessee is to maintain the property in good and proper condition and operate the lines, and upon termination of the lease to surrender the properties to the lessor, or such person or corporation as shall be entitled thereto, in good order and condition, wear and tear excepted, with such additions and betterments as shall have been made thereto. Provision is made for the adjustment of balances in certain accounts at the termination of the lease, including reimbursement for additions and betterments to the leased premises. The object of the formula is to produce the same net

railway operating income as would have been earned by the Gulf under separate operation. For the year 1937 (December estimated), under separate operation, the net railway operating income of the Gulf is shown as $443,834. On the basis of 1937 revenues, computation of net railway operating income in accordance with the formula, and giving effect to the anticipated savings, produces $469,794.

The net railway operating income of the Rock Island decreased from $3,650,879 in 1932 to a deficit of $1,023,558 in 1935, but increased to $657,437 in 1936 and to $2,503,248 in the first eight months of 1937. The deficits in net income, including fixed charges, but excluding depreciation on equipment, increased from $4,367,280 in 1932 to $10,625,777 in 1935, decreasing to $9,130,566 in 1936 and to $4,124,046 for the first eight months of 1937. The profit and loss account as of August 31, 1937, showed a debit balance of $51,069,135. The net railway operating income of the Gulf for the years 1932–36, and the first eight months of 1937, is shown in order as $397,350, $291,716 deficit, $48,845 deficit, $84,360, $343,244, and $373,997.

22 The deficits in net income, including fixed charges, but excluding depreciation on equipment, were $832,990 in 1932, $1,539,365 in 1933, decreasing to $900,595 in 1936, and to $414,458 for the first eight months of 1937. The profit and loss account as of August 31, 1937, showed a debit balance of $1,098,880. Neither carrier paid any Federal income taxes during the years mentioned except $82.21 by the Gulf in 1932.

In Consolidation of Railroads, 159 I. C. C. 522, the properties of the Gulf and the Rock Island are assigned to System No. 19, Rock Island-Frisco. Inasmuch as the lease is effective only for the period of the trusteeship of either carrier, its approval will not prevent or hinder the carrying out of any portion of the consolidation plan.

On behalf of the protestants it was testified that the removal or dismissal of the employees involved will have a serious effect upon the business of Fort Worth, reducing the volume thereof to the extent of the total salaries of the employees, estimated at $143,000; that the transfer or dismissal of the employees will impose hardships upon them and their families, estimated at 200 persons, and result in those employees losing, either partially or entirely, their investments in property of the estimated value of $175,000, of which about $44,000 is still unpaid; that if the lease be approved it is probable the Rock Island, for a time at least, will lose revenues exceeding the estimated savings; and that Fort Worth businessmen fear that, if the lease be approved, other railroads serving Fort Worth might attempt to follow the same procedure, thereby decreasing railroad employment to the great detriment of the business interests of that city and of the State of Texas.

The protestants contend that the showing of the applicants
23 does not meet the requirements made in Control of Virginian Ry., 117 I. C. C. 67, decided October 11, 1926, wherein on page 85 it is said:

"Applications for authority to acquire control of railroads under the interstate commerce act must be supported by *a clear and strong showing of public gain.* If serious doubt exists regarding the wisdom of the proposed grouping, that doubt must be resolved against the applications. Real and substantial advantages of railroad grouping are capable of reasonable proof. So are the disadvantages. *There must be of record a substantial preponderance of evidence* in favor of an application before we are warranted in giving it favorable consideration." [Italics added.]

This statement was reiterated in Control of Erie R. R. and Pere Marquette Ry., 138 I. C. C. 517, 530, decided May 8, 1928. In the former case, involving application by the Norfolk & Western Railway Company to acquire control by lease of the railroad of the Virginian, the Commission stated that the lease therein involved would result in eliminating existing routes or channels of trade, and all competition between the lines of the two companies. In the second case, involving, among other things, the application of the Chesapeake & Ohio Railroad Company to acquire control of the Erie Railroad Company, by purchase of capital stock, the Commission stated its various objections to the proposed control of the Erie, among them being that acquisition at that time would constitute practically an allocation of an important trunk line in advance of the adoption of any general plan for the formation of competitive systems in Eastern territory, and that there was no exigency in the affairs of either carrier which required action at that time. Since then the Erie has been assigned to System No. 6, Chesapeake & Ohio-Nickel Plate. See Consolidation of Railroads, 159 I. C. C. 522, and 185 I. C. C. 403,
24 decided December 9, 1929, and July 13, 1932, respectively. By decision of December 7, 1937, in New York, C. & St. L. R. Co. and Erie R. Co. Control, 224 I. C. C. 259, we approved and authorized acquisition by the Chesapeake & Ohio of control of the Erie by purchase of capital stock. Approval of the lease now under consideration will not result in the elimination of competition nor have any effect upon rates, nor does it involve the allocation of a property prior to the adoption of the final consolidation plan. Protestants also quote at length from our decision in Acquisition of Illinois Southern Tel. Co., 145 I. C. C. 43, decided June 26, 1928. It is perhaps sufficient to say in regard to that case that it involved an application under section 407 of the Transportation Act, as amended, by a new corporation to acquire the properties of four telephone companies; that there was no physical connection between two of the properties on the one hand and those of the other two, except by toll lines; and that the financing proposed, over which we had no jurisdiction, would increase the securities outstanding in the hands of the public without the addition of any property. None of these features is involved in the case under consideration.

The employees request a finding that the proposed lease will not promote the public interest, or if it be held that it is in the public

interest, a condition be imposed requiring the applicants to provide protection to the employees adversely affected of the nature afforded by the so-called Washington agreement dated May 1, 1936, wherein certain carriers, including the Rock Island, and employee organizations agreed upon allowances to be made to employees affected by joint action of two or more carriers whereby they unify, consolidate, merge, or pool in whole or in part their separate railroad
25 facilities or any of the operations or services previously performed by their separate facilities. Under this agreement the Gulf, the Rock Island, and the Peoria Terminal Company are treated as one carrier.

On argument counsel for the clerks suggested for our consideration a condition or conditions providing that employees to be dismissed be entitled to receive one year's salary, and employees who would be required to move from one point on the system to another be entitled to reimbursement of expenses incurred in moving their household effects and dependent members of their families, and that there be no reduction in wages or positions because of the change of location of their places of employment.

There is thus presented for our determination the question whether we have jurisdiction to impose conditions of the nature indicated. The last sentence of section 5 (4) (b) reads as follows:

"If after such hearing the Commission finds that, subject to such terms and conditions *and such modifications as it shall find just and reasonable*, the proposed consolidation, * * *, will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and will promote the public interest, it may enter an order approving and authorizing such consolidation, * * * upon the terms and conditions *and with the modifications so found to be just and reasonable.*" [Italics added.]

In its third supplemental report in Consolidation of Railroads, 185 I. C. C. 493, supra, at page 427, the Commission said:

"In working out the modified plan herein approved, it is expected that carriers will give careful consideration to the interests of their employees with the view of avoiding the imposition of
26 undue hardships upon them in connection with the relocation and consolidation of shops and offices. When applications under section 5 of the act may be filed for our approval, the applicants will be expected to deal adequately with these questions and, to the extent necessary and warranted by the record, we will consider the imposition of such conditions as we may find to be proper and within our jurisdiction. If any doubt exists as to our jurisdiction in the premises it should be safeguarded by Congress."

In St. Paul Bridge & Term. Ry. Co. Control, 199 I. C. C. 588, decided May 2, 1934, we stated there is no definition in section 5 (4) of the term "public interest"; that the language in that paragraph is broad enough to comprehend every public interest; that since

employees are important elements of the railway transportation industry and of the communities in which railways operate, their interest in changes in management, ownership, or operations of the companies by which they are employed is manifest; that it is likewise manifest that theirs is a public interest as well as a private interest, and that (page 596)—

"It is our view that in appropriate cases and where the record before us shows the need based upon considerations of public interest in the broad sense, we may make our findings approving applications under section 5 (4) of the act subject to just and reasonable requirements imposed in the interest of employees of the railways concerned."

In view of the circumstances in that case we concluded the applicant therein should maintain a separate seniority register of the employees of the terminal involved. On argument counsel for the applicants in the proceeding here under consideration stated they are willing to "dovetail" the seniority lists of the Gulf and the Rock Island employees involved if the clerks so desire.

27 In Texas v. United States, 292 U. S. 522, the Supreme Court of the United States held it was within the Commission's power to approve the lease of a line of railroad in Texas to a railroad corporation not incorporated under the laws of Texas even though such approval would result in the removal from the State of various offices and shops of the lessor.

It is clear from the record that the duplicate accounting now necessary under the present plan of operating the properties of the applicants requires excessive expenditures not in the public interest and which are a burden on interstate and foreign commerce. We are of the opinion, however, that provision should be made for the protection of the employees who will be forced to accept positions at reduced compensation, or who will be dismissed, or who will be required to change the place of their employment, as a result of operation under the lease herein considered. Accordingly our authorization will be upon the following conditions:

1. No employee of the trustees of The Chicago, Rock Island and Pacific Railway Company and the trustees of The Chicago, Rock Island and Gulf Railway Company, hereinafter designated as the carriers, who is continued in service shall, for a period of five years from the commencement of operation under the said lease but not beyond the date of termination, as to either carrier, of the reorganization proceedings under section 77 of the Bankruptcy Act, be placed, as a result of operation under said lease, in a worse position with respect to compensation and rules governing working conditions than he occupied at the date of commencement of operation under said lease, so long as he is unable in the exercise of his seniority rights under existing agreements, rules, and practices, to obtain a position producing compensation equal to or exceeding the compensa-

28 tion of the position held by him at the date of commencement of such operation; that so long as he is unable to obtain a position with said trustees yielding compensation equal to or exceeding his compensation at the time of the commencement of said operation, he shall be entitled to a monthly allowance equal to the difference between the monthly compensation of the position in which he is retained and the compensation of the position in which he was displaced, the latter monthly compensation to be considered one-twelfth of the total compensation received by him in the twelve months prior to his displacement, less compensation at the rate of compensation of his retained position for any time lost on account of his voluntary absences, provided, however, that the employee's compensation which it is the purpose of this condition to guarantee shall in no case exceed that which he received in the 12 months prior to his displacement, reduced by any change in wage scales or revision of rules detrimental to the employee, which change or revision is made to affect railroad employees generally; and provided further, that nothing herein shall operate to affect in any respect the retirement on pension or annuity rights and privileges in respect of any of the employees; and provided further, that if any employee elects not to exercise his seniority rights he shall be entitled to no allowance.

2. Any employee of the carriers who is deprived of employment with said carriers, hereinafter designated as a dismissed employee, because of the abolishment of his position or the loss thereof as a result of the exercise of seniority rights by an employee whose position is abolished as a result of operation under said lease, shall be accorded a monthly allowance, designated dismissal allowance, based on length of service (except in the case of an employee with

29 less than one year of service) equivalent to 60 percent of the average monthly compensation of said dismissed employee during the last twelve months of his employment in which he earned compensation prior to the date he is first deprived of employment; that this allowance be made to each eligible employee while unemployed during the period beginning with the date he is deprived of employment and extending in each instance for a length of time determined and limited by the following schedule, but not beyond the date of termination of the bankruptcy proceedings involving either carrier:

1 yr.	and	less	than	2	yrs.	----------	6	months
2 yrs.	"	"	"	3	"	----------	12	"
3 yrs.	"	"	"	5	"	----------	18	"
5 yrs.	"	"	"	10	"	----------	36	"
10 yrs.	"	"	"	15	"	----------	48	"
15 yrs.	and	over				----------	60	"

provided, that a dismissal allowance shall cease prior to the expiration of the prescribed period in the event of failure of the employee without good cause to return to service after being notified by the trustees of a position for which he is eligible, and provided further

that the dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his monthly earnings in such employment and his dismissal allowance exceed the amount upon which his dismissal allowance is based. An employee shall not be regarded as a dismissed employee in case of his resignation, death, retirement on pension, dismissal for good cause, or furlough because of reduction of forces due to seasonal requirements. A dismissal allowance shall cease prior to the expiration of the prescribed period in the event of resignation, death, retirement on pension, or dismissal for good cause.

3. Any employee who is retained in the services of the carriers, or who is restored to service from the group of employees entitled to receive a dismissal allowance, who is required to change the point of his employment as a result of operation under said lease, designated as a transferred employee, and who is required, within one year from the date of commencement of operation under said lease, to move his place of residence, shall be reimbursed for expenses of moving his household and other personal effects, for the traveling expenses of himself and his immediate family, and his own actual wage loss, not to exceed two days, the exact extent of the responsibility of the carriers to be agreed upon in advance by the said carriers and the employee affected, provided, however, that changes in places of residence subsequent to the initial change caused by the operation under said lease and which result from the exercise of seniority rights shall not be considered within the foregoing provision.

4. Any transferred employee who owns his home, or an equity therein, shall be protected against any loss suffered in the sale thereof, within one year of the effective date of operation under said lease, for not less than its fair value, said fair value to be determined as of a date 30 days prior to the filing of the application in this proceeding by the carrier, and such fair value to be agreed upon by the carriers and each employee prior to such sale; and if any transferred employee holds an unexpired lease of a dwelling occupied by him as a home, the carriers shall protect him from loss and cost in securing cancellation of his said lease.

The carriers and the employees should be able to agree upon rules and procedure to make effective the intent of the foregoing conditions, such intent being to prevent, for the designated periods, reduction in salaries of retained employees, to provide an allowance for employees who are dismissed as a result of operation under the lease and who are unable to secure other employment, and to reimburse transferred employees for expenses and losses incurred in connection with the transfer of their place of residence made necessary because of the operation under said lease.

Subject to the foregoing conditions, we find that the proposed lease by Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, as trustees in reorganization proceedings of The Chicago, Rock Island

and Pacific Railway Company and of the properties of The Chicago, Rock Island and Gulf Railway Company, of which they are also trustees in reorganization proceedings, upon the terms and conditions proposed, will be in harmony with and in furtherance of the Commission's plan for the consolidation of railroad properties, and will promote the public interest.

No order will be entered approving and authorizing the least pending notice to us that the applicants accept the foregoing conditions.

MAHAFFIE, Commissioner, dissenting in part:

In the finding, insofar as it approves the lease in question, I concur. There can be no doubt on this record that the proposal of the trustees will promote the public interest. It meets fully the test approved by the Supreme Court in a similar case, *Texas* v. *United States*, 292 U. S. 522, 531:

"The criterion to be applied by the Commission in the exercise of its authority to approve such transactions—a criterion reaffirmed by the amendments of Emergency Railroad Transportation Act, 1933—
is that of the controlling public interest. And that term as
32 used in the statute is not a mere general reference to public
welfare, but, as shown by the context and purpose of the Act, 'has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities.'"

I am unable, however, to agree that affirmative action based on that finding should be deferred pending the acceptance by applicants of the conditions sought to be imposed by the majority relating to the pay and expenses of the trustees' employees.

As a Commission we exercise authority delegated to us by a statute. Had Congress intended that we have jurisdiction over the compensation and expenses of railroad employes it easily could have so provided. In the absence of such a provision in specific language I do not think it proper that we attempt, by construction, to regulate conditions of employment as an incident to the exercise of power that clearly is conferred on us.

We have called the attention of the Congress to our lack of jurisdiction adequately to protect employees from financial loss or other inconvenience as a consequence of authorized railway unifications found to be in the public interest. Our recommendation in that regard has been before the Congress since 1935. The subject matter of the conditions here imposed has been before the Congress in various forms since our recommendation but no such legislation has been enacted. Other means have been, and are now being, employed by the Federal government specifically to deal with the conditions of carrier employment. Our jurisdiction has not been changed. Possibly this is due to a belief that such matters as here are attempted to be controlled as a condition of our approval can be handled better by direct negotiations between the parties concerned.

33 Conditions imposed beyond our statutory authority are of no effect. United States v. Chicago, M., St. P. & P. R. Co., 282 U. S. 311, 331. If we possessed definite statutory authority to impose, in connection with our approval, such conditions as are here required to be accepted by the trustees before we take final action on this application, there would be no need to defer action. We could at once enter a final order making them effective. If conditions are valid no acceptance is necessary. It may, I think, be assumed that doubt as to our power furnishes the only reason for bargaining with the applicants as to acceptance.

I do not here consider the conditions in terms. Had we jurisdiction over such matters of social welfare we well might make them more comprehensive. I think it a bad and dangerous policy for a Commission, such as this, to undertake to regulate matters of social welfare without clear statutory authority. Such a policy can lead only to confusion and misunderstanding.

By the Commission, division 4.

[SEAL] W. P. BARTEL, *Secretary.*

34 *Exhibit B to petition*

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 11847. Chicago, Rock Island & Gulf Railway Company Trustees Lease

Submitted March 1, 1939. Decided April 3, 1939

Report of division 4 herein, 230 I. C. C. 181, approving and authorizing, upon prescribed conditions, lease by Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, as trustees of the Chicago, Rock Island & Pacific Railway Company, of the properties of the Chicago, Rock Island & Gulf Railway Company, of which they are also trustees, modified to provide for entering of an order subject to the prescribed conditions.

Appearances as noted in previous report, and Otis F. Glenn for applicants, and R. W. Fairchild for interveners.

REPORT OF THE COMMISSION ON REARGUMENT

By the Commission:

This proceeding under section 5 (4) of the Interstate Commerce Act involves the proposed lease by Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, trustees in reorganization proceedings under section 77 of the Bankruptcy Act, as amended, of The Chicago, Rock Island and Pacific Railway Company, of the
35 properties of The Chicago, Rock Island and Gulf Railway Company, all in the State of Texas, of which they are also

trustees, until the termination of the bankruptcy proceedings involving either carrier.

In its report of October 29, 1938, in this proceeding, 230 I. C. C. 181, referred to as the previous report, division 4 found that, subject to prescribed conditions which will be referred to below, the proposed lease will be in harmony with and in furtherance of our plan for the consolidation of railroad properties, and will promote the public interest, but withheld the entering of an order pending notice of the applicants' acceptance of the conditions imposed. The case has been reargued before us.

In the report it is stated that operation by the Chicago, Rock Island & Pacific, referred to hereinafter as the Rock Island, under the proposed lease will not impose upon the public any conditions pertaining to the transportation of freight different from those now in effect, will result in no change in service to the public, and will have no effect on rates or routes. On the basis of their present business, the trustees estimate they can accomplish an annual saving of $100,000 under the proposed operation by the elimination of the duplicate accounting now necessary, of which saving $6,000 or $7,000 will accrue to the Chicago, Rock Island & Gulf, hereinafter referred to as the Gulf, and the remainder to the Rock Island. Testimony is that this saving is to be brought about by the transfer of 20 employees from Fort Worth to the Rock Island's accounting offices at Chicago, and the dismissal of 49 other employees now at Fort Worth, unless business increases sufficiently to warrant the retention of a greater number of employees. No savings can be effected except by the proposed reduction of forces. On argument before
36 division 4 on June 28, 1938, counsel for the applicants stated that the 20 employees mentioned would be retained at Fort Worth for the present, probably five years.

The division held that the duplicate accounting necessary under the present plan of operating the two properties requires excessive expenditures which are not in the public interest and which are a burden on interstate and foreign commerce. It approved and authorized the proposed lease upon four stated conditions, which need not be repeated, designed for the protection of employees who would be required to accept reduced compensation, those who would be dismissed, and those who would be required to change their places of residence to other points on the system, and suggested that the carriers and the employees should be able to agree upon rules and procedure to make effective the intent of those conditions.

The Rock Island is organized under the laws of the States of Iowa and Illinois. The Gulf is incorporated under the laws of the State of Texas, and its operations are confined to that State, with the exception of about a mile in Oklahoma. The Rock Island owns all the Gulf's outstanding capital stock, and, subject to pledge, all its outstanding bonds. The financial results of their operations are set forth in the previous report, as is also a description of train opera-

tions. In Consolidation of Railroads, 159 I. C. C. 522, we assigned the properties of both carriers to system No. 19, Rock Island-Frisco. The laws of Texas require that railroad corporations operating within that State shall be incorporated and shall maintain their general offices and shops therein. In Texas v. United States, 292 U. S. 522, the Supreme Court of the United States sustained our power to approve the lease of a line of railroad in Texas to a
37 railroad corporation not incorporated under the laws of that State, even though such approval would result in the removal from the State of various offices and shops of the lessor.

Counsel for the State and the city of Fort Worth suggest that the court did not hold that we may not consider State laws in determining whether or not a proposal of this character is in the public interest, and contend, in effect, that depriving the State of effective control of the Gulf, which will be the result of approval of the lease, is not in the public interest for the reason that such approval would be contrary to the views or desires of the citizens of Texas as expressed in their laws. This contention would be entitled to serious consideration if, in the disposition of the lease herein involved, we could legally disregard lines of railroad operated by the Rock Island in 13 other States. The contention is also made that the showing of the applicants does not warrant approval of the lease, and that there has not been a full, fair, and complete disclosure by the applicants of attendant disadvantages to them and to the public.

We think that the controlling facts are correctly set forth in the previous report, and that the proposal of the applicants is clearly within the following language in Texas *v.* United States, supra, pages 530 and 531:

"These broadening provisions of the Emergency Railroad Transportation Act, 1933, [section 5 (4a and b) of the Interstate Commerce Act] confirm and carry forward the purpose which led to the enactment of Transportation Act, 1920. (Title IV, 41 Stat. 474, *et seq.*). We found that Transportation Act, 1920, introduced into the federal legislation a new railroad policy, seeking to insure an adequate transportation service. To attain that end, new rights, new obliga-
38 tions, new machinery, were created. [Citations omitted.] It is a primary aim of that policy to secure the avoidance of waste. That avoidance, as well as the maintenance of service, is viewed as a direct concern of the public. [Citations omitted.] The authority given to the Commission to authorize consolidations, purchases, leases, operating contracts, and acquisition of control, was given in aid of that policy. New York Central Securities Corp. v. United States, 287 U. S. 12, 24, 25. The criterion to be applied by the Commission in the exercise of its authority to approve such transactions—a criterion reaffirmed by the amendments of Emergency Railroad Transportation Act, 1933—is that of the controlling public interest. And that term as used in the statute is not a mere general reference to public welfare, but, as shown by the context and pur-

pose of the Act, 'has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities. * * *'"

The applicants contend that the conditions as to employees relate to a subject matter over which we have no jurisdiction, and that the withholding of the order is an interlocutory disposition of the case without legal warrant and in conflict with the provisions of the act. It is their view that unless we issue an order they cannot test our jurisdiction in proceedings before the courts, and they ask that, if we think we have jurisdiction to impose conditions of the nature prescribed, an order containing those conditions be entered.

Whatever authority we have to approve the lease herein proposed, subject to the conditions imposed by division 4, is delegated to us in the last sentence of section 5 (4) (b), which reads as follows:

"If after such hearing the Commission finds that, subject to such terms and conditions *and such modifications as it shall find just and reasonable*, the proposed consolidation, * * *, will be in
39 harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and will promote the public interest, it may enter an order approving and authorizing such consolidation, * * * upon the terms and conditions *and with the modifications so found to be just and reasonable*." [Italics added.]

The question before us, therefore, is whether those conditions are just and reasonable modifications of the terms and conditions of the proposed lease in the public interest.

In our third supplemental report in Consolidation of Railroads, decided July 13, 1932, 185 I. C. C. 403, at page 487 we said:

"In working out the modified plan herein approved, it is expected that carriers will give careful consideration to the interests of their employees with the view of avoiding the imposition of undue hardships upon them in connection with the relocation and consolidation of shops and offices. When applications under section 5 of the act may be filed for our approval, the applicants will be expected to deal adequately with these questions and, to the extent necessary and warranted by the record, we will consider the imposition of such conditions as we may find to be proper and within our jurisdiction. If any doubt exists as to our jurisdiction in the premises it should be safeguarded by Congress."

In St. Paul Bridge & Term. Ry. Co. Control, 199 I. C. C. 588, decided May 2, 1934, division 4 stated there is no definition in section 5 (4) of the term "public interest"; that the language in that paragraph is broad enough to comprehend every public interest and the interest of every group or element of the public; that since employees are important elements of the railway transportation industry and of the communities in which railways operate, their interest in changes in management, ownership, or operations of the

40 companies by which they are employed is manifest; that it is likewise manifest that theirs is a public interest as well as a private interest, and that (page 596):

"It is our view that in appropriate cases and where the record before us shows the need based upon considerations of public interest in the broad sense, we may make our findings approving applications under section 5 (4) of the act subject to just and reasonable requirements imposed in the interest of employees of the railways concerned."

In view of the circumstances in that case division 4 concluded the applicant therein should maintain a separate seniority register of the employees of the terminal involved. The applicants in the proceeding here under consideration stated they are willing to "dovetail" the seniority lists of the Gulf and the Rock Island employees involved if the clerks so desire.

We have not heretofore had occasion to consider the report in the above case as to the imposition of conditions, except in connection with a proceeding involving an application under section 1 (18–20) of the act, Chicago, G. W. R. Co. Trackage, 207 I. C. C. 315, wherein, at page 322, we pointed out that our power to impose conditions under section 5 (4) is stated in terms different from those in section 1 (18–20). In Associated Rys. Co. Acquisition and Securities, 228 I. C. C. 277, 336, we cited with approval the conclusion of the division that the interest of the employees in changes of management, etc., of companies by which they are employed is a public as well as a private interest.

We have heretofore urged that there is need for carriers to do everything that can be done to make railroad service attractive to the public and to improve earnings through reduction of operating costs. The proposal now before us is to reduce operating

41 expenses, and contemplates an "avoidance of waste." The saving will be a continuing one, and accomplished wholly by reduction of the payrolls. The question arises whether a requirement that it be shared for a time with the employees at whose expense it will be brought about is just and reasonable within the meaning of the act. The applicants contend that the conditions impose upon them what might be termed duplicate costs, in that although they have paid taxes under the Social Security Act and will have to continue to do so under the Railroad Unemployment Act, which they say is intended, among other things, to cover unemployment caused by proposals of this nature, they will be required by us to make payments out of their own funds to the employees financially adversely affected by the elimination of the Gulf's accounting department at Fort Worth. We doubt that the foregoing legislation can be considered as circumscribing our authority under the Interstate Commerce Act.

The language of section 5 (4) (b) is broad, and, as we view it, the only limitation is that any conditions we impose must be in

the public interest. Manifestly it would be impossible, because of the many and changing situations which arise in proceedings under section 5 (4), for Congress to undertake to grant specific jurisdiction to impose a particular condition or conditions in the public interest. We concur in the finding of division 4 in St. Paul Bridge & Term. Ry. Co. Control, supra, that the welfare of the employees affected is one of the matters of public interest which we must consider in proceedings under section 5 (4), and, therefore, are of the opinion that the conditions imposed in the proceeding herein involved are proper and relate to a subject matter within
42 our jurisdiction. We are not attempting to exercise jurisdiction to regulate employment, nor the compensation of employees, nor their expenses. We are simply attempting in the public interest reasonably to protect those employees of the applicants who may be adversely affected economically by the grant of authority herein against unavoidable but unreasonable and unjust burdens which are not in the public interest. Accordingly, the finding of division 4 in that regard should be, and it is, affirmed.

The only other question in this case is whether it is within our power to withhold the entering of an order until the applicants agree to accept the conditions. This practice is one which we have followed for some time. It is not necessary to cite all the various cases. Among the earlier ones were New York Central Unification, 150 I. C. C. 278 and 154 I. C. C. 489, and Missouri Pac. R. Co. Unification, 166 I. C. C. 154 and 175 I. C. C. 26. The last one, by division 4, was New York, C. & St. L. R. Co. and Erie R. Co. Control, 224 I. C. C. 259. It seems to us that it must be conceded we have power to determine the procedure necessary to make our findings effective. However, we have no inclination to decide this case in such a manner as in the opinion of the applicants would make it impossible for them to secure a review of our conclusions by the courts.

Accordingly, we find that, subject to the conditions prescribed in the previous report herein dated October 29, 1938, the proposed lease by Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, trustees in reorganization proceedings of The Chicago, Rock Island and Pacific Railway Company, of the properties of The Chicago, Rock Island and Gulf Railway Company, of which they are also trustees in reorganization proceedings, upon the terms and
43 conditions proposed, will be in harmony with and in furtherance of our plan for the consolidation of railroad properties, and will promote the public interest, and we will enter an appropriate order, effective 40 days from its date.

EASTMAN, Commissioner, concurring:

While I think there is reasonable doubt whether in approving this lease we have power, as the law now stands, to attach a condition for the protection of the railroad employees who may be adversely

affected thereby, such protection is desirable and in the public interest and I believe that the Commission is justified in resolving the doubt in favor of the condition. Division 4 proposed to withhold the entering of an order until the applicants agreed to accept the condition. In objecting to this, I think applicants were on sound ground in the circumstances, but this method of dealing with the matter has now been changed and applicants are given an order, subject to the condition, which they can test in court, if they so desire.

With respect to this matter there has been much ado about very little, it seems to me. The protection of the employees for which the condition provides is substantially the same in character as the protection to which the great majority of the railroads agreed in May 1936, after prolonged negotiations with representatives of the employees, and that agreement is still outstanding. Furthermore, the so-called Committee of Six, which included three railroad executives, in their report to the President on December 23, 1938, with respect to the transportation problem, recommended that the Federal agency passing upon railroad consolidations "require, as a prerequisite to its approval, a fair and equitable arrangement to protect the interests of the said employees"; and I understand that the
44 recommendations of the Committee of Six have been approved by the directors of the Association of American Railroads. This does not mean that either the Committee or the Association took the position that the Commission now has the power to attach such a condition under the present law, but it does mean that the condition which we have imposed is one which they believe that we ought to have clear authority to impose and which they also believe to be in accord with sound public policy.

CASKIE, Chairman, dissenting in part:

I concur in the conclusion that the lease here considered will promote the public interest within the meaning of that term as used in section 5 (4) (b) of the act and as interpreted by the Supreme Court in a similar case, Texas v. United States, 292 U. S. 522, 531.

I regret that I am unable to join in the further conclusion of the majority that we are empowered by that section to impose conditions for the protection of employees who will be adversely affected by the lease. I am fully sympathetic with the humanitarian efforts of the majority to protect in these times of widespread unemployment the employees at whose expense the operating economies here proposed will be made. In my opinion, however, neither the section of the act under which we are asked to approve the lease nor any other provision thereof authorizes us to prescribe these conditions, notwithstanding that they are inherently just and reasonable. Had Congress intended to invest us with that authority, it would have expressed that intention in definite and unequivocal language. Our jurisdiction is strictly statutory and can not be extended by implication.

45 Until now a like opinion evidently has been held by the majority. In our annual reports to the Congress for 1935 and 1936, for example, we specifically recommended that further statutory provisions be enacted to protect employees from undue financial loss as a consequence of authorized railway unifications found to be in the interest of the general public or otherwise lawfully effected. Congress has amended the interstate commerce act in other respects but has made no change in this respect in section 5 (4) since we first submitted that recommendation. The assumption of authority here to prescribe these conditions obviously is inconsistent with that recommendation. Only recently, in our report in Railway Exp. Agency, Inc., Pooling Application, 227 I. C. C. 517, we found, with respect to the pooling and division of earnings agreement there considered under section 5 (1) of the act, that the imposition of conditions in respect of the rates of pay and rules governing employment of joint express and railroad agents is a matter not within our jurisdiction.

MAHAFFIE, Commissioner, dissenting in part:

For the reasons stated in my dissent from the original report herein, 230 I. C. C. 181, 190, I am unable to agree that we have been given jurisdiction to regulate carrier employment or the compensation and expenses of carrier employees.

I am authorized to state that Commissioners Lee and Miller concur in this expression.

Commissioner Aitchison did not participate in the disposition of this case.

46 ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 3rd day of April, A. D. 1939.

FINANCE DOCKET No. 11847. CHICAGO, ROCK ISLAND & GULF RAILWAY COMPANY TRUSTEES LEASE

Investigation of the matters and things involved in this proceeding having been made, a hearing having been held, and said Commission having, on the date hereof, made and filed a report on reargument containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the lease by Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, trustees in reorganization proceedings of The Chicago, Rock Island and Pacific Railway Company, of the properties of The Chicago, Rock Island and Gulf Railway Company, of which they are also trustees, referred to in the application and report aforesaid, upon the terms and conditions proposed and upon the conditions prescribed in the report of division 4 of this Commission, dated October 29, 1938, in this proceeding be, and it is hereby, approved and authorized.

It is further ordered, That within 10 days after the execution thereof, the said trustees shall file with this Commission a certified copy of said lease as executed.

It is further ordered, That the said trustees of The Chicago,
47 Rock Island and Pacific Railway Company, when filing and adopting schedules establishing rates and fares applicable on the properties leased, shall in such schedules refer to this order by title, date, and docket number.

And it is further ordered, That this order shall take effect and be in force from and after 40 days from its date.

By the Commission.

[SEAL] W. P. BARTEL, *Secretary.*

50 In United States District Court

[Title omitted.]

Answer of United States of America

Filed June 23, 1939

United States of America, one of the respondents in the above entitled action, for answer to the petition filed therein against it, answers and says:

I

United States admits the truth of the facts alleged in the opening paragraph and paragraphs numbered 1, 2, 3, 4, 5, and 6, inclusive, of the petition.

II

United States denies the matters, things, and conclusions alleged in paragraphs numbered 7, 8, and 9 of petition.

III

Answering paragraph numbered 10 of the petition, United States denies that the matters and things alleged in the first three sentences of said paragraph are within the jurisdiction of this Court and alleges that said matters are within the exclusive jurisdiction of the Interstate Commerce Commission. Answering the remaining allegations of said paragraph 10, United States admits that the Interstate Commerce Act and the Constitution of the State of Texas and the statutes of that State contain the provisions mentioned in said paragraph 10.

51 IV

Answering paragraph 11 of petition, United States admits that petitioners have no remedy at law against the order, or any part

thereof, of the Interstate Commerce Commission described in the petition, but United States denies that petitioners will suffer irreparable injury or damage or any other legal injury if the relief prayed in the petition is not granted.

V

Further answering the petition, and more particularly paragraph 10 thereof, United States alleges that said order of the Interstate Commerce Commission merely approves and authorizes the lease therein described, upon the terms and conditions set forth by the Commission; but the order does not command, direct, or compel petitioners to exercise or execute the authority thereby granted; and United States further alleges that there is no provision of law or penalty enforceable against petitioners for failure or refusal to exercise or execute the authority conferred upon them by said order; but United States admits that petitioners are without authority lawfully to avail themselves of and to exercise the authority conferred by said order to execute the lease therein described without also complying with the terms and conditions attached to and made a part of the authorization contained in said order.

VI

Further answering the petition, United States denies that this Court has power or jurisdiction to annul and enjoin the terms and conditions prescribed by said order without simultaneously enjoining and annulling the entire order as made and entered by said Commission; and United States further denies that said terms and conditions may be separated from or dealt with separately from the order as a whole, as made and entered by the Commission; and United States further denies that this Court has power or jurisdiction to grant the relief prayed by the petition.

52 Wherefore, having fully answered, United States prays that the relief sought by the petition be denied and that the petition be dismissed at the cost of the petitioners, and that it have the benefit of such other and further orders, decrees, or relief as may be just and proper.

ELMER B. COLLINS,
Elmer B. Collins,
Special Assistant to the Attorney General.

WILLIAM J. CAMPBELL,
William J. Campbell,
United States Attorney.

THURMAN ARNOLD,
Thurman Arnold,
Assistant Attorney General.

54 In United States District Court

[Title omitted.]

Answer of the Interstate Commerce Commission

Filed June 22, 1939

The Interstate Commerce Commission, hereinafter called the Commission, one of the defendants in the above-entitled action, answers and says:

I

Answering paragraphs 1 to 4, inclusive, of the petition, the Commission admits, for the purposes of this suit, that the allegations therein contained are true, with the exception that the Commission alleges that the application referred to in paragraph 4 as having been filed on or about October 30, 1937, was in fact filed on November 8, 1937.

55 II

Answering paragraph 5 of the petition, the Commission admits the issuance by it of the report therein referred to, dated October 29, 1938, but for more full and complete information concerning the contents of said report, the Commission respectfully refers the Court to said report, attached to and made a part of the petition as Exhibit A.

III

Answering paragraph 6 of the petition, the Commission admits the issuance by it of the report therein referred to, dated April 3, 1939, but for more full and complete information concerning the contents of said report, the Commission respectfully refers the Court to said report, attached to and made a part of the petition as Exhibit B.

IV

Answering paragraphs 7 and 8 of the petition, the Commission denies the allegations therein contained.

V

Answering paragraph 9 of the petition, the Commission disclaims information sufficient to form a belief as to the truth of the allegations contained therein, but insofar as such allegations conflict with statements contained in the Commission's reports, or either of them, the Commission denies the truth of such allegations.

56

VI

Answering the first sentence of paragraph 10 of the petition, the Commission avers that the allegations contained therein, as to said lease being beneficial; as to the expenditures referred to therein as being excessive, not in the public interest and a burden on interstate commerce, are all questions for the exclusive determination of the Interstate Commerce Commission in passing upon the question whether the approval of the lease sought by plaintiffs should be granted or denied.

Further answering the second sentence of paragraph 10 of the petition, the Commission admits that expenditures are required under the present plan of separate operation of the properties comprising the Chicago, Rock Island & Gulf Railway Company in accordance with the laws of the State of Texas.

Further answering paragraph 10 of the petition, the Commission admits that the Interstate Commerce Act and the Constitution of the State of Texas and statutes of that State, contain the provisions mentioned in said paragraph.

VII

Answering paragraph 11 of the petition, the Commission denies that petitioners will suffer irreparable injury or damage or any other injury or damage if the relief prayed in the petition is not granted.

57

VIII

Further answering the petition, the Commission alleges that said order of April 3, 1939, with the conditions attached, now sought to be set aside, merely approves and authorizes the lease therein described, which approval and authorization was sought in an application filed by petitioners herein; that such approval and authorization was granted by the Commission after the full hearing provided for in the Interstate Commerce Act; that at the hearing upon the application therein, a large volume of testimony and other evidence bearing upon the subject matter of the petition was submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of petitioners by their counsel; that in briefs filed in said proceeding and in oral argument questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of the parties by their respective counsel, and that the Commission determined said matters and entered and served upon the petitioners and other interested parties its said report and order approving and authorizing the lease therein described, but only upon the terms and conditions set forth therein by the Commission. The Commission further avers that said order does not command, direct, or compel petitioners to exercise or execute the authority thereby granted; and that if petitioners

are dissatisfied with the terms and conditions as contained in the Commission's order, they are free to disregard the lease in its
58 entirely, but the Commission alleges that petitioners are without authority to avail themselves of and to exercise the authority conferred by the Commission in said report and order of April 3, 1939, without also complying with the terms and conditions attached to and made a part of the authorization contained in said order.

IX

Further answering the allegations of the petition, the Commission alleges that this Court has no jurisdiction to grant the relief sought by petitioners, because if this Court were to annul and set aside the conditions attached by the Commission in its administrative judgment to the order authorizing the lease, the Court would be substituting its judgment for that of the Commission and would be approving the lease upon terms and conditions different from those deemed by the Commission necessary to protect the public interest.

Wherefore, having fully answered, the Commission prays that the relief sought by the petition be denied and that the petition be dismissed.

INTERSTATE COMMERCE COMMISSION,
By E. M. REIDY,
Assistant Chief Counsel.

DANIEL W. KNOWLTON,
Chief Counsel, Of Counsel.

59 [*Duly sworn to by Claude R. Porter; jurat omitted in printing.*]

61 In United States District Court

[Title omitted.]

Affidavit of W. H. Burns

Filed July 12, 1939

W. H. Burns, being first duly sworn on oath, deposes and says that he is now, and has been since December 1, 1933, General Auditor, with offices at Chicago, Illinois, for the Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company. That prior to December 1, 1933, affiant was Vice President and General Auditor of The Chicago, Rock Island and Pacific Railway Company, and has been in the Acounting Department of which he is now head, for more than 50 years. That he is now and for many years past has been familiar with the accounting methods employed on the Rock Island railroad system, including the accounting for The Chicago, Rock Island and Gulf Railway Company and its Trustees.

Affiant is the same W. H. Burns who appeared and testified as a witness for applicants at the hearing at Fort Worth, Texas, on

January 19, 1938, held by the Interstate Commerce Commis-
62 sion in the proceeding known as application of Trustees of The Chicago, Rock Island and Pacific Railway Company to lease properties of The Chicago, Rock Island and Gulf Railway Company, Finance Docket 11847. That he prepared the testimony and exhibits introduced at said hearing relative to the nature and the amount of savings that could be made by said applicants and would result from unified operations under the proposed leased involved in that proceeding.

Affiant has prepared an estimate of the maximum amounts that said applicant Trustees would have to pay as dismissal allowances, pursuant to the requirements of the report and order of the Interstate Commerce Commission in said proceeding, dated April 3, 1939, to employes of the Trustees of The Chicago, Rock Island and Gulf Railway Company in the offices of the Auditor and Sub-District Accountant at Fort Worth, Texas, in consequence of loss of their positions resulting from unified operations under the proposed lease. Said estimate is based on a study of the volume and requirements of the accounting work that would have to be performed under such unified operation and the resulting number of present employes would not be retained, their length of service, and average monthly compensation during the past 12 months, all ascertained and computed as nearly as may be in accordance with the dismissal allowance conditions prescribed by the Commission in its said report. That affiant estimates that there will be a total of 53 Accounting Department positions abolished, and 53 employes affected, in consequence of such unified operations under the propgsed lease. That the statement attached hereto shows the estimated maximum amounts
of the dismissal allowances to be paid said 53 employes, as
63 computed by affiant as aforesaid; and the matters and things contained therein are true and complete according to affiant's best knowledge and ability.

Affiant is unable to make an exact estimate of the total cost to applicants of compliance with the other conditions set forth in said order, with respect to compensation, moving expenses, and losses suffered from the sale of homes or cancellation of unexpired leases of employes who will be retained in applicants' service, but affiant verily believes, and so states, that there will be not less than 17 retained employes who will be affected in respect of the matters referred to, and that the cost to applicants of complying with said last-mentioned conditions will be not less than $10,000.

W. H. BURNS.

STATE OF ILLINOIS,
County of Cook, ss:

Subscribed and sworn to before me, a Notary Public in and for the county aforesaid, this 11th day of July 1939.

[SEAL] T. A. GRAHAM,
Notary Public.

64 *Exhibit to affidavit*

Length of service	Months allowed by order	Positions abolished	100% monthly salary	60% monthly salary	Annual payments under order					5-year total
					1st year	2nd year	3rd year	4th year	5th year	
15 years and over	60	35	$3,927.15	$3,556.29	$42,675	$42,675	$42,675	$42,675	$42,675	$213,375
10 years and less than 15	48	13	2,139.85	1,283.91	15,407	15,407	15,407	15,407	.....	61,628
5 years and less than 10	36	1	152.25	91.35	1,097	1,097	1,096	.....	.....	3,288
3 years and less than 5	18	.....	.....	.....	.....	.....	.....	.....	.....	.....
2 years and less than 3	12	3	308.45	185.07	2,221	.....	.....	.....	.....	2,221
1 year and less than 2	6	1	68.25	40.95	246	.....	.....	.....	.....	246
Total	.....	53	$8,595.95	$5,157.57	$61,645	$59,178	$59,178	$58,082	$42,675	$280,758

66 In United States District Court

[Title omitted.]

Findings of fact and conclusions of law

July 31, 1939

The Court hereby adopts the following

FINDINGS OF FACT

1. On November 8, 1937, petitioners filed with the Interstate Commerce Commission their application for authority under paragraph (4) of Section 5 of the Interstate Commerce Act of the Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company to lease the railways and properties of The Chicago, Rock Island and Gulf Railway Company, a corporation organized and existing under the laws of the State of Texas, upon the terms, conditions, and provisions set forth in the draft of lease submitted as part of the application. Said application was received by the Commission and given No. 11847, on its Finance Docket.

2. On January 19, 1938, the Commission held a hearing upon said application at Fort Worth, Texas, upon notice duly given as
67 required by law. Said proceeding was thereafter heard by and submitted to Division 4 of the Commission, which thereafter issued its report dated October 29, 1938, in which it found:

"Subject to the foregoing conditions, we find that the proposed lease by Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, as trustees in reorganization proceedings of The Chicago, Rock Island and Pacific Railway Company and of the properties of The Chicago, Rock Island and Gulf Railway Company, of which they are also trustees in reorganization proceedings, upon the terms and conditions proposed, will be in harmony with and in furtherance of the Commission's plan for the consolidation of railroad properties, and will promote the public interest.

"No order will be entered approving and authorizing the lease pending notice to us that the applicants accept the foregoing conditions."

3. Said report of Division 4 dated October 29, 1938, also contains the following findings:

"No change in train operations is herein involved. Operation by the Rock Island under the proposed lease will not impose upon the public any conditions pertaining to transportation of freight different from those now in effect, will result in no change in service to the public, and will have no effect upon rates or routes."

And again:

"The only change which will be effected, if the lease be approved, will be in the accounting department of the Gulf at Fort Worth. The applicants show that duplication of accounting could be eliminated in connection with interline and foreign freight, equipment rents and repairs, purchase of company material, pay rolls, and to a minor extent in connection with passenger traffic, and that unified operation as proposed would permit discontinuance of the compilation of separate statistics and the making of separate reports. This change would be brought about by the transfer of 20 employees from Fort Worth to the accounting department of the Rock Island at Chicago, and the dismissal of 49 employees, unless business increased sufficiently to warrant the retention of a greater number of men, resulting in an estimated annual saving of $100,000, of which $6,000 or $7,000 would accrue to the Gulf and the remainder to the Rock Island. On argument counsel for the applicants stated that since the hearing in this case, it has been determined that the 20 employees referred to will be retained at Fort Worth for the present. The estimate does not include a possible saving of $5,925 for office
68 rent at Fort Worth, which is dependent upon whether the vacated office space can be sublet. The general officers of the Gulf will continue to represent Rock Island interests but as officers of t Rock Island, and as at present some of them will have jurisdiction f Rock Island lines outside of the State of Texas. The testimony is that no saving could be effected except by the dismissal and transfer of employees involved."

And again:

"In Consolidation of Railroads, 159 I. C. C. 522, the properties of the Gulf and the Rock Island are assigned to System No. 19, Rock Island-Frisco. Inasmuch as the lease is effective only for the period of the trusteeship of either carrier, its approval will not prevent or hinder the carrying out of any portion of the consolidation plan."

And again:

"It is clear from the record that the duplicate accounting now necessary under the present plan of operating the properties of the applicants requires excessive expenditures not in the public interest and which are a burden on interstate and foreign commerce. We are of the opinion, however, that provision should be made for the protection of the employees who will be forced to accept positions at reduced compensation, or who will be dismissed, or who will be required to change the place of their employment as a result of operation under the lease herein considered."

The foregoing and other facts found by Division 4 were affirmed by the entire Commission.

4. Thereafter, petitioners sought for and had a reconsideration and reargument before the entire Commission. On April 3, 1939, the Commission issued its report and entered an order approving and authorizing said lease, upon the terms and conditions set forth in the draft of lease submitted with the application, but only upon the conditions prescribed in said report of Division 4 in said proceeding, which conditions it incorporated in its order by reference.

5. Said conditions are contained in paragraphs numbered 1, 2, 3, and 4 of said report of Division 4 of October 29, 1938, and may be thus summarized:

69 Retained Employes

(a) No employe of either party to the lease shall, for 5 years after lease operation begins, be placed, as a result of lease operations, in a worse position with respect to compensation and rules governing working conditions than he occupied at the date of commencement of lease operations, as long as he is unable in the exercise of seniority rights, to obtain a position producing compensation equal to or exceeding the compensation of the position held by him at such date of commencement; as long as he is unable to obtain such equal compensation, he shall be entitled to a monthly allowance equal to the difference between the monthly compensation actually received under lease operations and monthly compensation of the position in which he was displaced.

(b) If required to change the point of his employment as the result of lease operation, and if required thereby within one year from commencement thereof to move his place of residence, he shall be reimbursed for expense of moving his household effects and traveling expenses of himself and immediate family; also his actual wage loss, not exceeding two days.

(c) Any employe shall be protected against any loss suffered in the sale of his home within one year of the effective date of lease operations, for not less than its fair value; or against loss in securing the

cancellation of an unexpired lease of a dwelling house occupied as a home by such employe.

Dismissed Employes

(a) Any employe who is dismissed because his position is abolished or because he loses it by exercise of seniority rights by an employe whose position is abolished as a result of lease operation, shall be accorded a monthly allowance while deprived of employment, equal to 60% of his average monthly compensation during the last 12 months of his employment. The period of such monthly allowance is as follows:

Length of service:	Period of employment
1 yr. and less than 2 yrs.	6 months
2 yrs. " " " 3 yrs.	12 "
3 yrs. " " " 5 yrs.	18 "
5 yrs. " " " 10 yrs.	36 "
10 yrs. " " " 15 yrs.	48 "
15 yrs. and over	60 "

The dismissal allowance ceases prior to the expiration of the prescribed period in the event of certain contingencies; and is subject to reduction in the case of employment elsewhere, if monthly earnings plus dismissal allowance exceed his former railroad pay.

70 The foregoing conditions are supplemented and amplified by various incidental provisions, such as that the payments required shall cease in any event upon the termination, as to either carrier, of the reorganization proceedings.

6. Said report of the entire Commission of April 3, 1939, contains the following:

"Accordingly, we find that, subject to the conditions prescribed in the previous report herein dated October 29, 1938, the proposed lease by Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, trustees in reorganization proceedings of The Chicago, Rock Island and Pacific Railway Company, of the properties of The Chicago, Rock Island and Gulf Railway Company, of which they are also trustees in reorganization proceedings, upon the terms and conditions proposed, will be in harmony with and in furtherance of our plan for the consolidation of railroad properties, and will promote the public interest, and we will enter an appropriate order, effective 40 days from its date."

7. The case came on for hearing before this Court on July 12, 1939, at which time petitioners introduced in evidence the affidavit of W. H. Burns, General Auditor for the petitioners, which stated that there are approximately 53 employes of petitioners whose positions would be lost or abolished in consequence of operation under the approved lease; that if each of said employes shall retain the status entitling him to a dismissal allowance for the full period of payment and in the full amount prescribed in said conditions, peti-

tioners would be required to pay on account of such dismissal allowances not less than the following amounts:

First year	$61,645
Second year	59,178
Third year	59,178
Fourth year	58,082
Fifth year	42,675
	$280,758

Said affidavit further states that according to affiant's belief the cost to petitioners of complying with the other of said conditions will be not less than $10,000.

71 8. There is no issue of fact or law presented by the pleadings in this case except the questions (a) of the Commission's legal power to impose the conditions contained in said report of Division 4 and adopted by the entire Commission in its report and order of April 3, 1939; and (b) the power of this Court to grant the prayer of the petition that the conditions be annulled and enjoined without enjoining and annulling the entire order.

Based on the facts of record herein, the Court makes and adopts the following

CONCLUSIONS OF LAW

1. That the conditions referred to in, and made a part of, the order of the Interstate Commerce Commission dated April 3, 1939, are beyond the power of the Interstate Commerce Commission to impose, and are illegal and void.

2. That the petitioners herein are entitled to an order enjoining, setting aside, annulling, and suspending that part of said order of the Interstate Commerce Commission dated April 3, 1939, which refers to and consists of said conditions, and perpetually restraining and enjoining the defendants, their officers, agents, and attorneys, from enforcing, or attempting to enforce, that part of said order.

3. This Court has jurisdiction of the subject matter and of the parties to this suit, and has power, under the provisions of the

72 Urgent Deficiencies Act of October 22, 1913, Chapter 32, 38 Statutes at Large 220, to enjoin, annul, and set aside said conditions without enjoining, annulling, or setting aside said order in its entirety.

EVAN A. EVANS,
United States Circuit Judge.
CHARLES E. WOODWARD,
United States District Judge.
F. RYAN DUFFY,
United States District Judge.

74 In United States District Court for the Northern District of Illinois, Eastern Division

No. 615

FRANK O. LOWDEN, JAMES E. GORMAN, AND JOSEPH B. FLEMING, AS TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY AND AS TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND GULF RAILWAY COMPANY, PLAINTIFFS

v.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Suit by Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, as Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company and as Trustees of The Chicago, Rock Island and Gulf Railway Company against the United States and the Interstate Commerce Commission for an order enjoining, setting aside, and annulling a part of the order of the Interstate Commerce Commission dated April 3, 1939, which imposed certain conditions upon the Plaintiffs.

Opinion

Filed July 31, 1939

Before Evans, Circuit Judge, Woodward, District Judge, and Duffy, District Judge.

PER CURIAM: The Chicago, Rock Island and Pacific Railway Company, comprising 8,138 miles of railroad (hereinafter referred to as the "Pacific Company"), and The Chicago, Rock Island and Gulf Company, comprising 652 miles of railroad (hereinafter
75 referred to as the "Gulf Company"), are both in bankruptcy for the purpose of reorganization under Section 77 of the Bankruptcy Act. The plaintiffs were appointed Trustees of both properties. The Pacific Company owns all of the capital stock apd the bonds of the Gulf Company. Notwithstanding the separate organization, the Gulf Company is a component part of the Rock Island System.

On November 8, 1937, the petitioners, who are plaintiffs herein, filed with the Interstate Commerce Commission an application for authority under paragraph (4) of Section 5 of the Interstate Commerce Act to lease the railway and properties of the Gulf Company. Hearings were had by the Commission, and Division Four thereof issued its report dated October 29, 1938, in which it was found:

"Subject to the foregoing conditions, we find that the proposed lease by Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, as trustees in reorganization proceedings of The Chicago, Rock Island and Pacific Railway Company and of the properties of The

Chicago, Rock Island and Gulf Railway Company, of which they are also trustees in reorganization proceedings, upon the terms and conditions proposed, will be in harmony with and in furtherance of the Commission's plan for the consolidation of railroad properties, and will promote the public interest.

"No order will be entered approving and authorizing the lease pending notice to us that the applicants accept the foregoing conditions."

Said findings further stated:

"No change in train operations is herein involved. Operation by the Rock Island under the proposed lease will not impose upon the public any conditions pertaining to transportation of freight different from those now in effect, will result in no change in service to the public, and will have no effect upon rates or routes."

76 The findings also contained the following provision:

"The only change which will be effected, if the lease be approved, will be in the accounting department of the Gulf at Fort Worth. The applicants show that duplication of accounting could be eliminated in connection with interline and foreign freight, equipment, rents and repairs, purchase of company material, pay rolls, and to a minor extent in connection with passenger traffic, and that unified operation as proposed would permit discontinuance of the compilation of separate statistics and the making of separate reports. This change would be brought about by the transfer of 20 employees from Fort Worth to the accounting department of the Rock Island at Chicago, and the dismissal of 49 employees, unless business increased sufficiently to warrant the retention of a greater number of men, resulting in an estimate annual saving of $100,000, of which $6,000 or $7,000 would accrue to the Gulf and the remainder to the Rock Island. On argument counsel for the applicants stated that since the hearing in this case, it has been determined that the 20 employees referred to will be retained at Fort Worth for the present. The estimate does not include a possible saving of $5,925 for office rent at Fort Worth, which is dependent upon whether the vacated office space can be sublet. The general officers of the Gulf will continue to represent Rock Island interests but as officers of the Rock Island, and as at present some of them will have jurisdiction of Rock Island lines outside of the State of Texas. The testimony is that no saving could be effected except by the dismissal and transfer of employees involved."

The following finding also was made:

"It is clear from the record that the duplicate accounting now necessary under the present plan of operating the properties of the applicants requires excessive expenditures not in the public interest and which are a burden on interstate and foreign commerce. We are of the opinion, however, that provision should be made for the protection of the employees who will be forced to accept positions at reduced compensation, or who will be dismissed, or who will be

required to change the place of their employment, as a result of operation under the lease herein considered."

77 The entire Commission affirmed the findings of Division Four.

Petitioners obtained a reargument before the entire Commission, and on April 3, 1939, the Commission issued its report and entered an order authorizing said lease, but only upon conditions which may be summarized as follows:

"Retained employes

"(a) No employee of either party to the lease shall, for 5 years after lease operation begins, be placed, as a result of lease operations, in a worse position with respect to compensation and rules governing working conditions than he occupied at the date of commencement of lease operations, as long as he is unable in the exercise of seniority rights, to obtain a position producing compensation equal to or exceeding the compensation of the position held by him at such date of commencement; as long as he is unable to obtain such equal compensation, he shall be entitled to a monthly allowance equal to the difference between the monthly compensation actually received under lease operations and monthly compensation of the position in which he was displaced.

"(b) If required to change the point of his employment as the result of lease operation, and if required thereby within one year from commencement thereof to move his place of residence, he shall be reimbursed for expense of moving his household effects and traveling expenses of himself and immediate family; also his actual wage loss, not exceeding two days.

"(c) Any employee shall be protected against any loss suffered in the sale of his home within one year of the effective date of lease operations, for not less than its fair value; or against loss in securing the cancellation of an unexpired lease of a dwelling house occupied as a home by such employe.

78 "Dismissed employes

"(a) Any employe who is dismissed because his position is abolished or because he loses it by exercise of seniority rights by an employe whose position is abolished as a result of lease operation, shall be accorded a monthly allowance while deprived of employment, equal to 60% of his average monthly compensation during the last 12 months of his employment. The period of such monthly allowance is as follows:

"Length of Service:	*Period of payment*
1 yr. and less than 2 yrs.	6 months.
2 yrs. " " " 3 yrs.	12 "
3 yrs. " " " 5 yrs.	18 "
5 yrs. " " " 10 yrs.	36 "
10 yrs. " " " 15 yrs.	48 "
15 yrs. and over	60 "

"The dismissal allowance ceases prior to the expiration of the prescribed period in the event of certain contingencies; and is subject to reduction in the case of employment elsewhere, if monthly earnings plus dismissal allowances exceed his former railroad pay."

The report of the entire Commission also contained the following provisions:

"Accordingly, we find that, subject to the conditions prescribed in the previous report herein dated October 29, 1938, the proposed lease by Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, trustees in reorganization proceedings of The Chicago, Rock Island and Pacific Railway Company, of the properties of The Chicago, Rock Island and Gulf Railway Company, of which they are also trustees in reorganization proceedings, upon the terms and conditions proposed, will be in harmony with and in furtherance of our plan for the consolidation of railroad properties, and will promote the public interest, and we will enter an appropriate order, effective 40 days from its date."

Proof was made at the hearing before this Court that approximately 53 employes would lose their positions under the proposed lease; and that, should the conditions as to dismissed employes be carried out, the cost to the petitioners would be approximately $280,758 over a period of five years, and that compliance with the other conditions would cost the petitioners not less than $10,000.

There are no issues of fact involved, and the sole question to be determined is whether the Interstate Commerce Commission had the legal power to impose the conditions contained in the report of its Division Four and adopted by the entire Commission in its report and order of April 3, 1939.

It is fundamental that the Commission can only exercise the authority legally delegated to it by Congress. U. S. v. Penn. R. Co., 242 U. S. 208.

The statutory authority relied on is Section 5 (4) of the Interstate Commerce Act:

"(a) It shall be lawful, with the approval and authorization of the Commission, as provided in sub-division (b), for two or more carriers * * * to lease * * * the properties, or any part thereof, of another.

"(b) If after such hearing, the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraphs (3), and will promote the public interest, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon the terms and conditions and with the modifications so found to be just and reasonable."

79 It is urged by the defendants that under the provision "and will promote the public interest," the Commission was within

its legal powers in imposing the conditions hereinbefore stated. There can be no question but that the conditions imposed by the Commission were very desirable from the standpoint of social welfare. However, our inquiry must be confined to a consideration of whether the Commission possessed the power and authority which it attempted to exercise.

This court feels bound by the interpretation of the phrase "and will promote the public interest" which the Supreme Court has heretofore given when it considered same in connection with the Interstate Commerce Act.

In the case of New York Central Securities Company vs. United States, 287 U. S. 12, the Supreme Court, in an opinion by Chief Justice Hughes, considered the words "public interest" and stated:

"The provisions now before us were among the additions made by Transportation Act, 1920, and the term 'public interest' as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred."

80 In the case of Texas, et al., vs. United States, 292 U. S. 522, the court said:

"The criterion to be applied by the Commission in the exercise of its authority to approve such transactions—a criterion reaffirmed by the amendments of Emergency Railroad Transportation Act, 1933—is that of the controlling public interest. And that term as used in the statute is not a mere general reference to public welfare, but, as shown by the context and purpose of the Act, 'has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities.'" New York Central Securities Corp. v. United States, supra.

In the case of Schechter Corporation vs. United States, 295 U. S. 405, the court commented upon the powers which Congress had given to the Interstate Commerce Commission, and said (p. 540):

"When the Commission is authorized to issue, for the construction, extension, or abandonment of lines, a certificate of 'public convenience and necessity,' or to permit the acquisition by one carrier of the control of another, if that is found to be 'in the public interest,' we have pointed out that these provisions are not left without standards to guide determination. The authority conferred has direct relation to the standards prescribed for the service of common carriers and can be exercised only upon findings, based upon evidence, with respect to particular conditions of transportation."

In the case of West vs. P. B. & W. R. Company (Md.), 141 Atl. 509, the Railway Company desired to relocate its tracks and applied to the Public Service Commission of Maryland for its approval.

The Commission attached a proviso fixing the minimum grade for the new line which was different than the grade desired by the
81 railroad. The Commission justified the condition imposed on the ground that the grade desired by the railroad would injure the adjacent property by obstructing the view, lessening light and air, etc. The court stated (p. 515):

"These quotations fairly reflect the purpose and scope of the entire statute, and it is manifest from an examination of it, as well as of them, that the public interest which is committed to the protection of the commission is the interest which the public has in the operation of the railroads in such a manner as to furnish efficient service at reasonable rates, and that the power of the commission over railroad companies lies within those limits,"

and at (p. 516) stated further:

"But the 'public' referred to in that section obviously means the whole public, and not a particular part of it owning property contiguous to the railroad * * *."

Under the repeated interpretation of our Supreme Court, it is clear that Congress has not delegated to the Commission the power to impose conditions which have to do with the private employer-employee relationship, by reason of the phrase "will promote the public interest."

It is persuasive, although not controlling, that the Commission itself had grave doubts as to their authority to impose said conditions. The Commission divided six to four and, in addition, Commissioner Eastman, one of the majority, stated in his concurring opinion:

"While I think there is reasonable doubt whether, in approving this lease, we have power, as the law now stands, to attach a condition for the protection of the railroad employes who may be adversely affected thereby, such protection is desirable and in the public interest * * *."

82 Furthermore, in reports which the Commission made to Congress for the years 1935 and 1936, there were recommendations for further statutory provisions to protect employes from undue financial loss as a consequence of authorized railway unifications. Although Congress has amended the Interstate Commerce Act in other respects, it has made no change in paragraph (4) of Section 5.

The conditions which were made a part of the order of the Commission, dated April 3, 1939, are beyond the power of the Interstate Commerce Commission to impose and are illegal and void; and the petitioners are entitled to an order enjoining, setting aside, annulling, and suspending that part of the order which refers to and consists of said conditions, and perpetually restraining and enjoining the defendants from enforcing or attempting to enforce that part of the order.

There can be no question that this court has jurisdiction of the subject matter and of the parties to this suit, and has the power under

the Urgent Deficiencies Act of October 22, 1913, Chapter 32, 38 Statutes at Large 220, to enjoin, annul, and set aside said conditions without enjoining, annulling, or setting aside said order in its entirety.

We desire to emphasize, however, that nothing contained
83 in this opinion shall be construed as passing upon the validity of said order of the Interstate Commerce Commission, dated April 3, 1939, with said conditions annulled and set aside.

EVAN A. EVANS,
United States Circuit Judge.

CHARLES E. WOODWARD,
United States District Judge.

F. RYAN DUFFY,
United States District Judge.

85 In United States District Court for the Northern District of Illinois, Eastern Division

No. 615

FRANK O. LOWDEN, JAMES E. GORMAN, AND JOSEPH B. FLEMING, AS TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY AND AS TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND GULF RAILWAY COMPANY, PLAINTIFFS

vs.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Final decree

July 21, 1939

This cause having come on for final hearing on July 12, 1939, upon the petition, the several answers of the defendants, and the affidavit of W. H. Burns, which was offered by petitioners, and the Court having heard arguments of counsel, and having this day filed its findings of fact and conclusions of law, and now being fully advised in the premises, it is

Ordered, adjudged, and decreed:

1. That that part of said order of the Interstate Commerce Commission dated April 3, 1939, which consists of said conditions referred to in said findings of fact of the Court herein be, and the same is hereby, annulled and set aside.

2. That the defendants, their officers, agents, and attorneys,
86 be and they are hereby perpetually restrained and enjoined from enforcing, or attempting to enforce, that part of said order referred to in paragraph 1 hereof against the petitioners herein.

3. Nothing herein contained shall be construed as passing upon the validity of the said order of the Interstate Commerce Commission, dated April 3, 1939, with said conditions annulled and set aside.

Enter:

EVAN A. EVANS,
United States Circuit Judge.
CHARLES E. WOODWARD,
United States District Judge.
F. RYAN DUFFY,
United States District Judge.

JULY 21, 1939.

88 In United States District Court

[Title omitted.]

Petition for appeal

Filed August 28th, 1939

To the Honorable Judges of the United States District Court for the Northern District of Illinois, Eastern Division:

The United States of America and the Interstate Commerce Commission, defendants in the above-entitled case, feeling themselves aggrieved by the final decree entered by this Court on July 21, 1939, pray an appeal from said decree to the Supreme Court of the United States, in accordance with the statutory requirements.

The particulars wherein they consider the decree erroneous are set forth in the assignment of errors accompanying this petition, and to which reference is hereby made.

89 Said defendants pray that a transcript of the record, proceedings, and papers on which said decree was made and entered, duly authenticated, be transmitted forthwith to the Supreme Court of the United States.

Dated August 28, 1939.

WILLIAM J. CAMPBELL,
United States Attorney,
THURMOND ARNOLD,
Assistant Attorney General,
ELMER B. COLLINS,
Special Assistant to the Attorney General,
For the United States of America.
DANIEL W. KNOWLTON,
E. M. REIDY,
For the Interstate Commerce Commission.

91 In United States District Court

[Title omitted.]

Notice of appeal

Filed August 28th, 1939

To Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, as Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company and as Trustees of the Estate of The Chicago, Rock Island and Gulf Railway Company, Plaintiffs:

Please take notice that, pursuant to the statutes and rules of court in such case made and provided, the United States of America and the Inerstate Commerce Commission, defendants in the above-entitled case, and each of them, do hereby appeal to the Supreme Court of the United States from the final order and decree of the United States District Court for the Northern District of Illinois,
92 Eastern Division, made and entered on the 21st day of July 1939, which set aside, annulled, suspended, and permanently enjoined conditions attached to a certain order of the Interstate Commerce Commission in the proceeding entitled "Finance Docket No. 11847, Chicago, Rock Island and Gulf Railway Company Trustees Lease," dated April 3, 1939, wherein the Commission authorized the Trustees of the Rock Island to lease, upon certain prescribed conditions, the properties of the Chicago, Rock Island and Gulf.

Attached hereto is a copy of the petition for appeal and the order allowing the appeal, the assignments of error and the statement as to jurisdiction. Your attention is further directed to the provisions of Rule 12, paragraphs 2 and 3, which provide:

"2. If the appeal is allowed, the appellant shall serve upon the appellee within 5 days after such allowance (a) a copy of the petition for and order allowing the appeal, together with a copy of the assignments of error and of the statement required by paragraph 1 of this rule, and (b) a statement directing attention to the provisions of paragraph 3 of this rule. Proof of service of the papers required by this paragraph to be served shall be filed forthwith with the clerk of the court possessed of the record, and shall be incorporated by him in the transcript of record prepared for this court upon the appeal.

"3. Within 15 days after such service the appellee may file with the clerk of the court possessed of the record, and serve upon the appellant, a typewritten statement disclosing any matter or ground making against the jurisdiction of this court asserted by the appellant. There may be included in, or filed with, such opposing statement, a motion by appellee to dismiss or affirm. Where such a

motion is made, it may be opposed as provided in Rule 7, paragraph 3."

93 Dated August 28, 1939.

WILLIAM J. CAMPBELL,
United States Attorney,
THURMOND ARNOLD,
Assistant Attorney General,
ELMER B. COLLINS,
Special Assistant to the Attorney General,
For the United States of America.

DANIEL W. KNOWLTON,
E. M. REIDY,
For the Interstate Commerce Commission.

Service of the foregoing notice of appeal and the receipt of a copy thereof are hereby acknowledged this 28th day of August 1939.

W. F. PETER,
Counsel for Plaintiffs.

95 In United States District Court

[Title omitted.]

Assignment of errors

Filed August 28th, 1939

Now come the United States and the Interstate Commerce Commission, defendants in the above-entitled cause, by their respective counsel and in connection with their appeal, file the following assignments of error upon which they will rely in the prosecution of their appeal to the Supreme Court of the United States from the final decree of this Court entered July 21, 1939.

The District Court erred:

96 (1) In holding and deciding that the conditions referred to in, and made a part of, the order of the Interstate Commerce Commission dated October 29, 1938, and affirmed by the entire Commission on April 3, 1939, are beyond the power of said Commission to impose, and are illegal and void.

(2) In holding and deciding that the plaintiffs are entitled to an order enjoining, setting aside, annulling, and suspending that part of said order of the Interstate Commerce Commission of October 29, 1938, as affirmed by order dated April 3, 1939, which refers to and consists of said conditions, and perpetually restraining and enjoining the defendants, their officers, agents, and attorneys, from enforcing, or attempting to enforce, that part of said order.

(3) In holding and deciding that it had power, under the provisions of the Urgent Deficiencies Act of October 22, 1913, Chapter 32, 38 Stat. L. 220, to enjoin, annul, and set aside conditions attached

to the Commission's order involved in this case, without enjoining, annulling, or setting aside said order in its entirety.

(4) In that, in setting aside the conditions imposed by the Commission and attached to its order, which conditions the Commission found necessary and desirable to promote the public interest, the Court acted beyond its power because it usurped a function of
97 the Commission, substituted its judgment for that of the Commission upon an administrative matter, and in effect approved the lease of one railroad by another upon terms and conditions different from those found necessary by the Commission.

(5) In not dismissing the petition at plantiffs' costs.

Dated August 28, 1939.

WILLIAM J. CAMPBELL,
United States Attorney,
THURMOND ARNOLD,
Assistant Attorney General,
ELMER B. COLLINS,
Special Assistant to the Attorney General,
For the United States of America.

DANIEL W. KNOWLTON,
E. M. REIDY,
For the Interstate Commerce Commission.

99 In United States District Court

[Title omitted.]

Order allowing appeal

August 28, 1939

In the above-entitled cause, the United States of America and the Interstate Commerce Commission, defendants, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final decree of this Court entered July 21, 1939, and having also made and filed an assignment of errors, and a statement of jurisdiction, and having in all respects conformed to the statutes and rules of Court in such case made and provided, it is

100 Ordered and decreed that the appeal be, and the same is hereby, allowed as prayed for.

Dated August 28, 1939.

EVAN A. EVANS,
United States Circuit Judge.
CHARLES E. WOODWARD,
United States District Judge.

_____,
United States District Judge.

102 In United States District Court

[Title omitted.]

Notice to the Attorney General of the State of Illinois

Filed August 28, 1939

To the Honorable JOHN CASSIDY,
Attorney General of the State of Illinois:

Pursuant to the Urgent Deficiencies Act of October 22, 1913, 38 Stat. L. 221, you are hereby notified that the United States of America and the Interstate Commerce Commission, defendants in the above-entitled cause, have taken an appeal to the Supreme Court of the United States from the final decree of the United States
103 District Court for the Northern District of Illinois, Eastern Division, entered July 21, 1939, and the order allowing the appeal makes the same returnable within forty days from the date thereof.

Dated August 25, 1939.

WILLIAM J. CAMPBELL,
United States Attorney,
THURMAN ARNOLD,
Assistant Attorney General,
ELMER B. COLLINS,
Special Assistant to the Attorney General,
For the United States of America.
DANIEL W. KNOWLTON,
E. M. REIDY,
For the Interstate Commerce Commission.

Service of the foregoing notice to the Attorney General of the State of Illinois, and the receipt of a copy thereof, are hereby acknowledged this 25th day of August 1939.

JOHN E. CASSIDY,
Attorney General, State of Illinois.

114 In United States District Court

[Title omitted.]

Petition for order staying final decree pending appeal

Filed August 28, 1939

To the Honorable Evan A. Evans, United States Circuit Judge, Charles E. Woodward, and F. Ryan Duffy, United States District Judges:

The United States of America and the Interstate Commerce Commission, defendants in the above-entitled case, respectfully move that

this Court enter an order staying the judgment or final decree entered in this cause, pending the determination of their appeal from said decree to the Supreme Court of the United States, and show as grounds therefor:

1. On July 21, 1939, this Court entered its final decree annulling and setting aside that part of the order of the Interstate Commerce Commission issued April 3, 1939, which consists of the conditions referred to in the Court's findings of fact, and perpetually enjoining and restraining these defendants and their officers and employees from enforcing or attempting to enforce that part of said order.

115 2. The Commission's said order authorized, subject to the four conditions set forth in its report, the Trustees of the Chicago, Rock Island & Pacific Railway Company to lease the railway and properties of the Chicago, Rock Island & Gulf Railway Company, pending the reorganization of either of said companies, both of which are now involved in reorganization proceedings under Section 77 of the Bankruptcy Act, the plaintiffs being the trustees of both companies. Said conditions prevent, during prescribed periods, reductions in salaries of plaintiffs' employees who are retained after the lease becomes effective, require the Trustees to pay an allowance to employees who are dismissed as a result of operation under the lease and who are unable to secure other employment, and to reimburse transferred employees for expenses and losses incurred in connection with the transfer of their place of residence made necessary because of the operation under the lease.

3. These defendants, exercising the right conferred by Urgent Deficiencies Act (38 Stat. 219, U. S. Code, Sup. III, Title 28, Sec. 45a) have taken a direct appeal, allowed by order of this court entered August 28, 1939, to the Supreme Court of the United States from said final decree of July 21, 1939. That Act provides that "appeal to the Supreme Court, however, shall in no case supersede or stay the judgment ordered of the district court appealed from, unless the Supreme Court or a justice thereof shall so direct, and appellant shall give bond in such form and in such amount as the Supreme Court or the justice of that court allowing the stay, may require." The Supreme Court has held that application for a stay pending appeal under that Act should be presented first to the judges of the district court who have heard the case. Virginia Railway Company v. United States, 272 U. S. 658.

4. Said decree, in annulling and enjoining the conditions attached to the Commission's order and expressly declining to decide whether the authority to execute the lease constitutes a valid and legal act of authorization by the Commission after this Court's annulment of the terms and conditions upon which that authority was granted, leaves the plaintiffs free to proceed now with the execution of

116 the lease and immediately to abandon or discontinue the Fort Worth accounting office of the Gulf Company and discharge the employees of that office, without regard to the conditions prescribed by the Commission's order.

5. The Trustees have informed these defendants, by letter dated August 9, 1939, to Joseph B. Eastman, Chairman of the Interstate Commerce Commission, that they will so consummate the lease and place it in effect on September 1, 1939, and these defendants believe and allege that the Trustees will proceed accordingly unless an order is entered staying this Court's final decree and restraining the Trustees from so consummating the lease.

6. Unless restrained by order of Court, the Trustees will so proceed with the execution of the lease before the Supreme Court can hear and determine the appeal, and one of the questions of great public importance which the appeal presents, namely, whether the Commission's certificate or order, after annulment of the conditions enjoined and deleted by this Court's decree, constitutes a valid order or authorization within the meaning of the Interstate Commerce Act (Sec. 5 (4)), might be held to have become moot, in which event these defendants will have been deprived of their statutory right to a review and decision of that question by the Supreme Court.

7. Unless an order issues staying the decree of this Court pending appeal, the only effective remedy available to these defendants will be the institution of a suit for injunction, under section 5 (13) of the Interstate Commerce Act, to restrain the Trustees from executing the lease, on the ground that, since this Court has annulled the conditions which were an integral part of the Commission's order, the Trustees are without any authority to consummate the lease and will violate said Act by so doing. An order staying this Court's decree pending appeal will avoid the necessity of such suit in this Court, and will result in a final and expedited decision by the Supreme Court upon the same question which this Court would have to decide in such suit, and which undoubtedly would ultimately go to the Supreme Court for final decision.

117 8. Unless this Court's decree is stayed pending appeal the Trustees will proceed to place the lease in effect on September 1, 1939, and dismiss and discharge more than fifty employees of the Fort Worth accounting office without complying with said conditions so prescribed by the Commission. Therefore, said dismissed and discharged employees and consequently these defendants and the public interest, as embodied in said order, which it is their duty to protect and which said order seeks to protect, will suffer great and irreparable damage, of the nature and to the extent set forth in the Commission's report and order, during the pendency of the appeal before the Supreme Court, should that Court reverse the decree of this Court.

9. The Act invoked by the complaint in this case not only provides for the issuance of a stay order for the purpose of maintaining the status quo pending appeal, but it also makes the issuance of such stay order essential to the maintenance of the status quo pending appeal.

Wherefore, defendants pray that this Court enter an order staying, pending the appeal to the Supreme Court, the final decree entered in this cause on July 21, 1939, and restraining and preventing the plaintiffs from placing said lease into effect or otherwise changing the status quo of the matter involved in said order of the Commission, during the pendency of the appeal before the Supreme Court.

WILLIAM J. CAMPBELL,
United States Attorney.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
E. M. REIDY,
Assistant Chief Counsel,
Interstate Commerce Commission.

THURMAN ARNOLD,
Thurman Arnold,
Assistant Attorney General.
D. W. KNOWLTON,
D. W. Knowlton,
Chief Counsel, Interstate Commerce Commission.

119 In United States District Court

[Title omitted.]

Plaintiff's answer to petition for order staying final decree pending appeal

Filed August 28, 1939

For answer to defendants' petition for order staying final decree pending appeal, plaintiffs herein allege:

1. They admit the allegations of paragraphs 1 and 2 of the petition.

2. Answering paragraph 3 of the petition: plaintiffs have no information concerning the taking of an appeal by defendants from the final decree in this cause to the Supreme Court of the United States, and have not been served with notice thereof, or citation. Plaintiffs allege that said final decree is reviewable only by the Supreme Court of the United States, pursuant to Judicial Code,
120 Section 210 (U. S. C. A. Sec. 47 (a)). Said section provides:

"Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the district court appealed from, unless the Supreme Court or a justice thereof shall so direct," etc.

Plaintiffs allege that under the terms of said statute, this Court has no jurisdiction to stay said final decree pending appeal. And plain-

tiffs deny that the Supreme Court has held that a district court has such power with respect to final decrees entered by a three-judge court, enjoining, setting aside, annulling, or suspending an order of the Interstate Commerce Commission. The Rules of Civil Procedure for the District Courts of the United States, adopted by the Supreme Court of the United States pursuant to Act of Congress of June 19, 1934, Chapter 651, effective September 16, 1938, provide:

"Rule 62. STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT.

"(g) POWER OF APPELLATE COURT NOT LIMITED.—The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered; and these rules do not supersede the provisions of Section 210 of the Judicial Code, as amended, U. S. C., Title 28, Sec. 47a, or of other statutes of the United States to the effect that stays pending appeals to the Supreme Court may be granted only by that court or a justice thereof."

3. Plaintiffs admit the allegations of paragraphs 4 and 5 of the petition.

4. Plaintiffs deny that the consummation of the proposed lease during the pendency of an appeal to the Supreme Court
121 from said final decree herein will render moot the question whether the Commission's order, after annulment of the conditions enjoined and set aside by said final decree, constitutes a valid order or authorization of the Commission; and deny that the defendants would thereby be deprived of their right to a review and decision of that question by the Supreme Court.

5. Plaintiffs deny the allegations of paragraph 7 of the petition.

6. Plaintiffs deny the allegations of paragraph 8 of the petition and deny that either the defendants or the dismissed and discharged employes will suffer any damage whatsoever in case said final decree is not stayed pending appeal; if said lease is consummated, a reversal of said final decree without a stay order having been granted, will simply result in the obligation of plaintiffs to pay said employes such sums as shall have accrued and be due to them, respectively, in accordance with the conditions prescribed in said order of the Interstate Commerce Commission, and said amounts, being an obligation of plaintiff Trustees, are entitled to preference and priority in the administration of the Estates of which plaintiffs are Trustees, pursuant to the requirements of Section 64 of the Bankruptcy Act.

7. Answering paragraph 9 of the petition: plaintiffs admit that the Statute provides for the issuance of a stay order, but only in case the Supreme Court or a justice thereof shall so direct.

122 8. Further answering, plaintiffs allege that even if this Court should hold that it has jurisdiction to issue a stay

order in this case, no such stay order should be issued for the reason that the same would be improper under the facts and circumstances of the particular case and that this Court would not be warranted in the exercise of discretion under such circumstances in issuing the stay order prayed for. This for the following reasons:

(a) No injury, irreparable or otherwise, can result to defendants and to such employes who may be dismissed or otherwise affected by the consummation of the lease, in the event said final decree is reversed. In case of such reversal, plaintiffs would be obligated to pay whatever sums may have accrued and be due and owing to said employes, respectively, from the date of consummation of said lease to the date of such reversal.

(b) During the period January 1, 1936, to July 1, 1939, plaintiffs paid the Unemployment Tax pursuant to Title IX of the Social Security Act; and beginning July 1, 1939, have paid the Unemployment Tax (being 3% on plaintiffs' total payroll amount) under the Statute which became effective on that date, known as Railroad Unemployment Tax Act. Plaintiffs' employes who may lose their positions as a result of the consummation of said lease will be entitled to the benefits of unemployment insurance payments provided for in said statute, with the result that such employes will not suffer total cessation of income pending the appeal herein, even though no stay order is issued.

(c) If said stay order be granted plaintiffs will suffer great and irreparable injury and damage in the event said final degree is affirmed on appeal, in that they must either (1) forego the consummation of the lease and the benefit of the savings therefrom (approximately $9,000 per month), or (2) make the payments to employes as specified by the Commission's order. If said decree be affirmed plaintiffs cannot recoup themselves for either such loss in savings or for the amount so paid to employes. Nor can they recoup themselves from either of the defendants herein for the reason that neither the United States nor the Interstate Commerce Commission is required to give any bond, obligation, or other security in connection with the stay of decree.

123 (d) It does not appear that this Court entertains a serious doubt as to the correctness of its own decision, or that the decision depends upon a question of law on which there is conflict among the courts, and it affirmatively appears that there is no special reason why the order of the Commission should not become operative until its validity can be heard and determined by the Supreme Court.

Wherefore plaintiffs pray that said motion be denied.

OTIS F. GLENN,
M. L. BELL,
W. F. PETER,
Counsel for Plaintiffs.

125 In United States District Court

[Title omitted.]

Order staying final decree pending appeal

August 28, 1939

Upon the entering of the final decree in this cause came counsel for defendants, United States and Interstate Commerce Commission, and filed petition for an order staying the final decree of this Court, pending their appeal therefrom to the Supreme Court of the United States.

The Court having heard and considered the facts and arguments presented by the parties upon said petition, and it appearing that this Court has on August 28, 1939, allowed an appeal by the defendants to the Supreme Court of the United States from said final decree, that the appeal presents important questions concerning which there is doubt and which should be reviewed by the Supreme Court of the United States, and that great and irreparable injury and detriment to the defendants and to plaintiffs' employees concerned will ensue if said final decree is not stayed pending appeal; and it further appearing to the Court that the status quo should be preserved pending the appeal to the Supreme Court;

126 It is therefore ordered that the enforcement, operation, and execution against defendants, United States of America and Interstate Commerce Commission, their officers or agents, or any of them, of said final decree of this Court dated July 21, 1939, be, and it is hereby, stayed and suspended during the pendency and until the determination of the appeal in this cause by the Supreme Court of the United States; and the plaintiffs are hereby enjoined and restrained from changing in any manner the status quo of the matter involved in this cause, pending said appeal. This order is entered with the understanding that this appeal shall be presented to the Supreme Court at the 1939 October Term and that on or before October 20, 1939, appellant applies to the Supreme Court for an order advancing the cause on the October 1939 Calendar.

Further ordered that plaintiffs may, at any time, apply to the United States Supreme Court, or a Justice thereof, for an order modifying or vacating this order.

EVAN A. EVANS,
United States Circuit Judge.
CHARLES E. WOODWARD,
United States District Judge.
_____,
United States District Judge.

AUGUST 28, 1939.

128 In United States District Court

[Title omitted.]

Praecipe for transcript of record

Filed August 28, 1939

To the Clerk:

You will please prepare a transcript of the record in the above-entitled cause to be transmitted to the Supreme Court of the United States pursuant to the appeal of said Court heretofore filed and allowed, and incorporate in said transcript the following:

1. Petition to set aside conditions attached to an order of the Interstate Commerce Commission and Exhibits A and B thereto attached.
2. Answer of United States.

129 3. Answer of Interstate Commerce Commission.

4. Affidavit of W. H. Burns, introduced at hearing before the Court.
5. Findings of fact and conclusions of law by the District Court (filed July 31, 1939).
6. Opinion of the Court (filed July 31, 1939).
7. Final decree, filed July 21, 1939.
8. Petition for appeal.
9. Notice of appeal and acknowledgment of service.
10. Assignment of errors.
11. Order allowing appeal.
12. Notice to Attorney General of the State of Illinois.
13. Citation on appeal.
14. Statement of jurisdiction of Supreme Court, and Statement of Points to be Relied upon together with notice and acknowledgment of service.
15. Petition (filed August 28, 1939) for Order Staying final decree.
16. Plaintiffs' answer to petition for stay.
17. Order (filed August 28, 1939) staying final decree pending appeal.
18. Praecipe for transcript of record, and acknowledgment thereof.
19. Clerk's certificate.

Dated August 28, 1939.

WILLIAM J. CAMPBELL,
United States Attorney,
THURMAN ARNOLD,
Assistant Attorney General,
ELMER B. COLLINS,
Special Assistant to the Attorney General,
For the United States of America.

130 DANIEL W. KNOWLTON,
E. M. REIDY,
For the Interstate Commerce Commission.

Service of the foregoing praecipe for transcript of record and the receipt of a copy thereof are hereby acknowledged this 28th day of August 1939.

W. F. PETER,
Attorney for Plaintiffs-Appellees.

131 [Clerk's certificate to foregoing transcript omitted in printing.]

132 [Citation in usual form showing service on W. F. Peter, filed August 28, 1939, omitted in printing.]

134 In Supreme Court of the United States

Statement of points to be relied upon and designation of the record to be printed

Filed August 31, 1939

Come now the appellants and say that they will rely upon the points made in their assignments of error in brief and oral argument before this Court on their appeal in the above-entitled cause.

Appellants further state that the entire record in this cause as filed in this Court is necessary for consideration of the points set forth above.

August 28, 1939.

NEWMAN A. TOWNSEND,
Acting Solicitor General,
WILLIAM J. CAMPBELL,
United States Attorney,

135 THURMAN ARNOLD,
Assistant Attorney General,
ELMER B. COLLINS,
Special Assistant to the Attorney General,
For the United States of America.
DANIEL W. KNOWLTON,
E. M. REDDY,
For the Interstate Commerce Commission.

Service of a copy of this statement of points to be relied upon and designation of the record to be printed is acknowledged this 28th day of August, 1939.

W. F. PETER,
Counsel for Appellees.

[File endorsement omitted.]

[Endorsement on cover:] Enter: Atorney General. File No. 43,750. N. Illinois D. C. U. S. Term No. 343. The United States of America and the Interstate Commerce Commission, Appellants vs. Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, as Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, etc. Filed August 31, 1939. Term No. 343 O. T. 1939.

U. S. GOVERNMENT PRINTING OFFICE: 1939

FILE COPY

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FILED
AUG 31 1939
CHARLES ELMORE CROPLEY
CLERK

No. 343

In the Supreme Court of the United States

OCTOBER TERM, 1939

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

FRANK O. LOWDEN, JAMES E. GORMAN, AND JOSEPH B. FLEMING, AS TRUSTEES, ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

STATEMENT AS TO JURISDICTION AND MOTION TO ADVANCE

In the District Court of the United States for the Northern District of Illinois, Eastern Division

No. 615

FRANK O. LOWDEN, JAMES E. GORMAN, AND JOSEPH B. FLEMING, AS TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY AND AS TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND GULF RAILWAY COMPANY, PLAINTIFFS

v.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

STATEMENT AS TO JURISDICTION ON APPEAL

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, the United States and the Interstate Commerce Commission, appellants, submit herewith their statement showing the basis of the jurisdiction of the Supreme Court of the above-entitled case on appeal.

179701—39——1

A. The statutory jurisdiction of the Supreme Court to review by direct appeal the final decree complained of is conferred by:

Section 5 of the Commerce Court Act (c. 309, 36 Stat. 539; U. S. Code, Suppl. III, Tit. 28, Sec. 45a).

Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, 938, par. (4); U. S. Code, Tit. 28, Sec. 345).

Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 210, 219; U. S. Code, Tit. 28, Sec. 45 and 47a, Suppl. III).

B. The final decree sought to be reviewed was entered July 21, 1939. The petition for appeal was filed and the order allowing the appeal was entered August 28, 1939.

C. This suit was brought by Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, as Trustees of the Estate of the Chicago, Rock Island and Pacific Railway Company and as Trustees of the Estate of The Chicago, Rock Island and Gulf Railway Company, against the United States and the Interstate Commerce Commission to enjoin, set aside, and annul certain conditions attached to an order of the Interstate Commerce Commission, dated October 29, 1938, as affirmed by its order of April 3, 1939, in a proceeding then pending before it entitled "Finance Docket No. 11847, *Chicago, Rock Island and Gulf Railway Company Trustees Lease.*"

On November 8, 1937, the Trustees applied to the Interstate Commerce Commission for authority

under Section 5 (4) of the Interstate Commerce Act to lease the properties of the Gulf Company and as trustees of the Rock Island Company to enter into and accept such lease, the lease to run until the termination of the pending reorganization proceedings under Section 77 of the Bankruptcy Act of either the Gulf Company or the Rock Island Company.

After hearings were held and two reports issued, the Commission entered its order on April 3, 1939, authorizing the Trustees to consummate the lease, conditioned, however, upon the Trustees' acceptance of four terms, set out in full in the report, but which, briefly summarized, seek to prevent, for a period of five years, any reduction in salary of the retained employees who are affected by the lease; require an allowance for employees who are dismissed as a result of operation under the lease and who are unable to secure other employment, and require reimbursement of transferred employees for traveling and other expenses and losses incurred in connection with the transfer of their place of residence made necessary because of operation under the lease.

The Trustees filed this suit on May 24, 1939, praying that the Court annul and enjoin that part of the Commission's order which consists of said conditions, on the sole ground that the subject of the conditions was not within the Commission's authority or jurisdiction. The answers of the United States and the Interstate Commerce Com-

mission denied the alleged lack of authority in the Commission and challenged the Court's power to segregate the conditions from the order as a whole and to annul them without annulling and enjoining the order in its entirety.

Final hearing was held before a statutory court of three judges on July 12, 1939, at the conclusion of which the Court orally announced its decision sustaining its power to annul the conditions apart from the order as a whole, and holding that the conditions imposed by the Commission were beyond the power conferred upon it by the Interstate Commerce Act. The Court expressly declined to rule upon the validity or legal effect of the Commission's order with the conditions annulled and eliminated. Findings of fact, conclusions of law, and final decree were filed July 21, 1939, and a written opinion embodying the decision previously announced was filed July 31, 1939. The final decree permanently enjoins, annuls, and sets aside the conditions attached to the Commission's order, and expressly refrains from passing upon the validity of the order with the conditions annulled.

D. The questions presented are substantial and of public importance. Whether the courts have power to annul the terms and conditions subject to which the Commission finds a proposed lease to be in the public interest, without nullifying the entire order, and whether the Commission's authority under Section 5 (4) of the Act to attach to its approval of a proposed lease or acquisition

such reasonable terms and conditions as it finds necessary to promote public interest includes conditions affecting the welfare of substantial groups of railroad employees are questions which will continue to arise in proceedings before the district courts and the Commission, respectively, until finally determined by the Supreme Court.

E. The following cases sustain the jurisdiction of the Supreme Court to review the decree of the district court:

Atlantic Coast Line R. Co. v. *United States*, 284 U. S. 288.

Chicago Junction Case, 264 U. S. 258.

Ches. & Ohio Ry. Co. v. *United States*, 283 U. S. 35.

United States v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 282 U. S. 311.

N. Y. Central Securities Co. v. *United States*, 287 U. S. 12.

Copy of the opinion of the District Court is appended hereto.

NEUMAN A. TOWNSEND,
Solicitor General.

WILLIAM J. CAMPBELL,
United States Attorney.

THURMAN ARNOLD,
Assistant Attorney General.

ELMER B. COLLINS,
Special Assistant to the Attorney General,
For the United States of America.

DANIEL W. KNOWLTON,
E. M. REIDY,
For the Interstate Commerce Commission.

In the District Court of the United States for the Northern District of Illinois, Eastern Division

No. 615

FRANK O. LOWDEN, JAMES E. GORMAN, AND JOSEPH B. FLEMING, AS TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY AND AS TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND GULF RAILWAY COMPANY, PLAINTIFFS

v.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

SUIT BY FRANK O. LOWDEN, JAMES E. GORMAN, AND JOSEPH B. FLEMING, as Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company and as Trustees of The Chicago, Rock Island and Gulf Railway Company against the United States and the Interstate Commerce Commission for an order enjoining, setting aside, and annulling a part of the order of the Interstate Commerce Commission dated April 3, 1939, which imposed certain conditions upon the Plaintiffs

Before EVANS, Circuit Judge, WOODWARD, District Judge, and DUFFY, District Judge

PER CURIAM: The Chicago, Rock Island and Pacific Railway Company, comprising 8,138 miles

of railroad (hereinafter referred to as the "Pacific Company"), and The Chicago, Rock Island and Gulf Company comprising 652 miles of railroad (hereinafter referred to as the "Gulf Company"), are both in bankruptcy for the purpose of reorganization under Section 77 of the Bankruptcy Act. The plaintiffs were appointed Trustees of both properties. The Pacific Company owns all of the capital stock and the bonds of the Gulf Company. Notwithstanding the separate organization, the Gulf Company is a component part of the Rock Island System.

On November 8, 1937, the petitioners, who are plaintiffs herein, filed with the Interstate Commerce Commission an application for authority under paragraph (4) of Section 5 of the Interstate Commerce Act to lease the railway and properties of the Gulf Company. Hearings were had by the Commission, and Division Four thereof issued its report dated October 29, 1938, in which it was found:

> Subject to the foregoing conditions, we find that the proposed lease by Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, as trustees in reorganization proceedings of The Chicago, Rock Island and Pacific Railway Company and of the properties of The Chicago, Rock Island and Gulf Railway Company, of which they are also trustees in reorganization proceedings, upon the terms and conditions proposed, will be in harmony with and in furtherance of the

Commission's plan for the consolidation of railroad properties, and will promote the public interest.

No order will be entered approving and authorizing the lease pending notice to us that the applicants accept the foregoing conditions.

Said findings further stated:

No change in train operations is herein involved. Operation by the Rock Island under the proposed lease will not impose upon the public any conditions pertaining to transportation of freight different from those now in effect, will result in no change in service to the public, and will have no effect upon rates or routes.

The findings also contained the following provision:

The only change which will be effected, if the lease be approved, will be in the accounting department of the Gulf at Fort Worth. The applicants show that duplication of accounting could be eliminated in connection with interline and foreign freight, equipment rents and repairs, purchase of company material, pay rolls, and to a minor extent in connection with passenger traffic, and that unified operation as proposed would permit discontinuance of the compilation of separate statistics and the making of separate reports. This change would be brought about by the transfer of 20 employees from Fort Worth to the accounting department of the Rock Island at Chicago, and the dis-

missal of 49 employees, unless business increased sufficiently to warrant the retention of a greater number of men, resulting in an estimated annual saving of $100,000, of which $6,000 or $7,000 would accrue to the Gulf and the remainder to the Rock Island. On argument, counsel for the applicants stated that since the hearing in this case, it has been determined that the 20 employees referred to will be retained at Fort Worth for the present. The estimate does not include a possible saving of $5,925 for office rent at Fort Worth, which is dependent upon whether the vacated office space can be sublet. The general officers of the Gulf will continue to represent Rock Island interests, but as officers of the Rock Island, and as at present some of them will have jurisdiction of Rock Island lines outside of the State of Texas. The testimony is that no saving could be effected except by the dismissal and transfer of employees involved.

The following finding also was made:

It is clear from the record that the duplicate accounting now necessary under the present plan of operating the properties of the applicants requires excessive expenditures not in the public interest and which are a burden on interstate and foreign commerce. We are of the opinion, however, that provision should be made for the protection of the employees who will be forced to accept positions at reduced compensation, or who will be dismissed, or who will

be required to change the place of their employment, as a result of operation under the lease herein considered.

The entire Commission affirmed the findings of Division Four.

Petitioners obtained a reargument before the entire Commission, and on April 3, 1939, the Commission issued its report and entered an order authorizing said lease, but only upon conditions which may be summarised as follows:

RETAINED EMPLOYES

(a) No employe of either party to the lease shall, for 5 years after lease operation begins, be placed, as a result of lease operations, in a worse position with respect to compensation and rules governing working conditions than he occupied at the date of commencement of lease operations, as long as he is unable in the exercise of seniority rights, to obtain a position producing compensation equal to or exceeding the compensation of the position held by him at such date of commencement; as long as he is unable to obtain such equal compensation, he shall be entitled to a monthly allowance equal to the difference between the monthly compensation actually received under lease operations and monthly compensation of the position in which he was displaced.

(b) If required to change the point of his employment as the result of lease operation, and if required thereby within one year from commencement thereof to move his

place of residence, he shall be reimbursed for expense of moving his household effects and traveling expenses of himself and immediate family; also his actual wage loss, not exceeding two days.

(c) Any employe shall be protected against any loss suffered in the sale of his home within one year of the effective date of lease operations, for not less than its fair value; or against loss in securing the cancellation of an unexpired lease of a dwelling house occupied as a home by such employe.

DISMISSED EMPLOYES

(a) Any employe who is dismissed because his position is abolished or because he loses it by exercise of seniority rights by an employe whose position is abolished as a result of lease operation, shall be accorded a monthly allowance while deprived of employment, equal to 60% of his average monthly compensation during the last 12 months of his employment. The period of such monthly allowance is as follows:

Length of Service:	Period of payment
1 yr. and less than 2 yrs	6 months.
2 yrs. and less than 3 yrs	12 months.
3 yrs. and less than 5 yrs	18 months.
5 yrs. and less than 10 yrs	36 months.
10 yrs. and less than 15 yrs	48 months.
15 yrs. and over	60 months.

The dismissal allowance ceases prior to the expiration of the prescribed period in the event of certain contingencies; and is subject to reduction in the case of employment elsewhere, if monthly earnings plus

dismissal allowances exceed his former railroad pay.

The report of the entire Commission also contained the following provisions:

> Accordingly, we find that, subject to the conditions prescribed in the previous report herein dated October 29, 1938, the proposed lease by Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, trustees in reorganization proceedings of The Chicago, Rock Island and Pacific Railway Company, of the properties of The Chicago, Rock Island and Gulf Railway Company, of which they are also trustees in reorganization proceedings, upon the terms and conditions proposed, will be in harmony with and in furtherance of our plan for the consolidation of railroad properties, and will promote the public interest, and we will enter an appropriate order, effective 40 days from its date.

Proof was made at the hearing before this Court that approximately 53 employes would lose their positions under the proposed lease; and that, should the conditions as to dismissed employes be carried out, the cost to the petitioners would be approximately $280,758 over a period of five years, and that compliance with the other conditions would cost the petitioners not less than $10,000.

There are no issues of fact involved, and the sole question to be determined is whether the Interstate Commerce Commision had the legal power to impose the conditions contained in the report of its

Division Four and adopted by the entire Commission in its report and order of April 3, 1939.

It is fundamental that the Commission can only exercise the authority legally delegated to it by Congress. *U. S.* v. *Penn. R. Co.*, 242 U. S. 208.

The statutory authority relied on is Section 5 (4) of the Interstate Commerce Act:

> (a) It shall be lawful, with the approval and authorization of the Commision, as provided in subdivision (b), for two or more carriers * * * to lease * * * the properties, or any part thereof, of another.
>
> (b) If after such hearing, the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and will promote the public interest, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon the terms and conditions and with the modifications so found to be just and reasonable.

It is urged by the defendants that under the provision "and will promote the public interest," the Commission was within its legal powers in imposing the conditions hereinbefore stated. There can be no question but that the conditions imposed

by the Commission were very desirable from the standpoint of social welfare. However, our inquiry must be confined to a consideration of whether the Commission possessed the power and authority which it attempted to exercise.

This court feels bound by the interpretation of the phrase "and will promote the public interest" which the Supreme Court has heretofore given when it considered same in connection with the Interstate Commerce Act.

In the case of *New York Central Securities Company* v. *United States,* 287 U. S. 12, the Supreme Court in an opinion by Chief Justice Hughes, considered the words "public interest" and stated:

> The provisions now before us were among the additions made by Transportation Act, 1920, and the term "public interest" as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred.

In the case of *Texas et al.* v. *United States,* 292 U. S. 522, the court said:

> The criterion to be applied by the Commission in the exercise of its authority to approve such transactions—a criterion reaffirmed by the amendments of Emergency

> Railroad Transportation Act, 1933—is that of the controlling public interest. And that term as used in the statute is not a mere general reference to public welfare, but, as shown by the context and purpose of the Act, "has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities." *New York Central Securities Corp.* v. *United States, supra.*

In the case of *Schechter Corporation* v. *United States*, 295 U. S. 405, the court commented upon the powers which Congress had given to the Interstate Commerce Commission, and said (p. 540):

> When the Commission is authorized to issue, for the construction, extension, or abandonment of lines, a certificate of "public convenience and necessity," or to permit the acquisition by one carrier of the control of another, if that is found to be "in the public interest," we have pointed out that these provisions are not left without standards to guide determination. The authority conferred has direct relation to the standards prescribed for the service of common carriers and can be exercised only upon findings, based upon evidence, with respect to particular conditions of transportation.

In the case of *West* v. *P. B. & W. R. Company* (Md.), 141 Atl. 509, the Railway Company desired to relocate its tracks and applied to the Public Service Commission of Maryland for its approval.

The Commission attached a proviso fixing the minimum grade for the new line which was different than the grade desired by the railroad. The Commission justified the condition imposed on the ground that the grade desired by the railroad would injure the adjacent property by obstructing the view, lessening light and air, etc. The court stated (p. 515):

> These quotations fairly reflect the purpose and scope of the entire statute, and it is manifest from an examination of it, as well as of them, that the public interest which is committed to the protection of the commission is the interest which the public has in the operation of the railroads in such a manner as to furnish efficient service at reasonable rates, and that the power of the commission over railroad companies lies within those limits—

and at (p. 516) stated further:

> But the "public" referred to in that section obviously means the whole public, and not a particular part of it owning property contiguous to the railroad. • • •

Under the repeated interpretation of our Supreme Court, it is clear that Congress has not delegated to the Commission the power to impose conditions which have to do with the private employer-employee relationship, by reason of the phrase "will promote the public interest."

It is persuasive, although not controlling, that the Commission itself had grave doubts as to their

authority to impose said conditions. The Commission divided six to four and, in addition, Commissioner Eastman, one of the majority, stated in his concurring opinion:

> While I think there is reasonable doubt whether, in approving this lease, we have power, as the law now stands, to attach a condition for the protection of the railroad employes who may be adversely affected thereby, such protection is desirable and in the public interest. * * *

Furthermore, in reports which the Commission made to Congress for the years 1935 and 1936, there were recommendations for further statutory provisions to protect employes from undue financial loss as a consequence of authorized railway unifications. Although Congress has amended the Interstate Commerce Act in other respects, it has made no change in paragraph (4) of Section 5.

The conditions which were made a part of the order of the Commission, dated April, 3, 1939, are beyond the power of the Interstate Commerce Commission to impose and are illegal and void; and the petitioners are entitled to an order enjoining, setting aside, annulling, and suspending that part of the order which refers to and consists of said conditions, and perpetually restraining and enjoining the defendants from enforcing or attempting to enforce that part of the order.

There can be no question that this court has jurisdiction of the subject matter and of the parties

to this suit, and has the power under the Urgent Deficiencies Act of October 22, 1913, Chapter 32, 38 Statutes at Large 220, to enjoin, annul, and set aside said conditions without enjoining, annulling, or setting aside said order in its entirety.

We desire to emphasize, however, that nothing contained in this opinion shall be construed as passing upon the validity of said order of the Interstate Commerce Commission, dated April 3, 1939, with said conditions annulled and set aside.

EVANS A. EVANS,
United States Circuit Judge.
CHARLES E. WOODWARD,
United States District Judge.
F. RYAN DUFFY,
United States District Judge.

Filed JULY 31, 1939.

In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 343

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

FRANK O. LOWDEN, JAMES E. GORMAN, AND JOSEPH B. FLEMING, AS TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY AND AS TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND GULF RAILWAY COMPANY, APPELLEES

MOTION OF APPELLANTS TO ADVANCE

Pursuant to Rule 20, paragraph 3, of this Court, Appellants move that the Court advance this cause on its calendar and set it for argument and disposition at the earliest date consistent with the Court's convenience.

The District Court stayed its final decree pending the appeal to this Court, upon condition that Appellants present their appeal to this Court at the October Term, 1939, and apply on or before Octo-

ber 20, 1939, to this Court for an order advancing the cause (Tr. 126).

The statute which authorizes the direct appeal to this Court provides (Commerce Court Act, 36 Stat. 539; U. S. Code, Title 28, Sec. 47a):

> Appeals to the Supreme Court under this section shall have priority in hearing and determination over all other causes except criminal causes in that Court.

As a result of the stay order of the District Court, the estate of which the Appellees are trustees will be required to incur an expense approximating $9,000 per month in salary or benefit payments to the affected employees pending the determination of the case by this Court and apparently no part of this expenditure can be recovered, even though the decree below be affirmed (Tr. 122).

ROBERT H. JACKSON,
Solicitor General.

DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

Counsel for the Appellees concur in the above motion to advance.

W. F. PETER,
Counsel for Appellees.

U. S. GOVERNMENT PRINTING OFFICE: 1939

FILE COPY

No. 3

In the Supreme Court o

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The United States of Am
State Commerce Comm

v.

Frank O. Lowden, James E
B. Fleming, as Tr

*APPEAL FROM THE DISTRICT COU
FOR THE NORTHERN DISTRIC
DIVISION*

**BRIEF FOR THE UNITED STATE
COMMERCE CO**

Office - Supreme Court, U. S.
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C. GORMAN, AND JOSEPH
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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	3
Statement	4
Specification of errors to be urged	12
Summary of argument	13
Argument:	
I. The Conditions Imposed Are a Valid Exercise of the Commission's Authority Under Section 5 (4) (b) of the Interstate Commerce Act	16
1. Section 5 (4) (b) authorizes the Commission to impose any conditions which are "just and reasonable" in relation to the transaction involved	16
2. The conditions imposed are "just and reasonable"	24
3. The conditions imposed are in the public interest	32
4. The conditions imposed do not impair the constitutional rights of the appellees	37
II. Even If the Conditions Are Invalid, the Court Below Erred in Enjoining Their Enforcement and Leaving the Remainder of the Authorization Outstanding. The Proper Relief Would Have Been to Set Aside the Entire Authorization and Remand the Whole Proceeding to the Commission	39
Conclusion	48

CITATIONS

Cases:	
Associated Railways Company Acquisition, 228 I. C. C. 277	35
Baltimore & Ohio R. R. Co. v. *Interstate Commerce Commission*, 221 U. S. 612	33
Chicago G. W. Ry. Co. Trackage, 207 I. C. C. 315	17
Cleveland, C. C. & St. L. Ry. Co. v. *Jackson*, 22 F. (2d) 509	18, 21
Consolidation of Railroads, 185 I. C. C. 403	17
Delaware River Ferry Co. of New Jersey Abandonment, 212 I. C. C. 580	17
Federal Radio Commission v. *General Electric Co.*, 281 U. S. 464	45
Florida v. *United States*, 282 U. S. 194	41, 43

187059—39——1

Cases—Continued. Page

General Investment Co. v. *New York Central R. R.* (N. D. Ohio, Eq. No. 1180, October 24, 1924) 22
Interstate Commerce Commission v. *Baird*, 194 U. S. 25 44
Louisiana & Arkansas Ry. Co. Control, 233 I. C. C. 127 27
Louisiana & Arkansas Ry. Co. Merger, 230 I. C. C. 37 27
Oklahoma & Arkansas Ry. Co. Merger, 230 I. C. C. 156 27
Mahler v. *Eby*, 264 U. S. 32 42
Mississippi Valley Barge Line Co. v. *United States*, 292 U. S. 282 ..... 24, 33
Mulford v. *Smith*, 307 U. S. 38 38
New York Cent. Securities Co. v. *Cleveland, C. C. & St. L. Ry. Co.* (N. D. Ohio, Eq. No. 1163, October 24, 1924) 22
New York Central Securities Corp. v. *United States*, 287 U. S. 12 18
Nickel Plate Unification, 105 I. C. C. 425 20
Nueces Valley Townsite Co. v. *San Antonio U. & G. R. Co.*, 67 S. W. (2d) 215 ..... 18, 22
Panama Refining Co. v. *Ryan*, 293 U. S. 388 41
Piedmont & Northern Ry. v. *United States*, 280 U. S. 469 44
Procter & Gamble v. *United States*, 225 U. S. 282 45
Quincy, O. & K. C. Ry. Co. Abandonment & Control, 233 I. C. C. 471 17
Radio Comm'n v. *Nelson Bros. Co.*, 289 U. S. 266 44
Railroad Retirement Board v. *Alton R. Co.*, 295 U. S. 330 ..... 34, 38
Rochester Telephone Corp. v. *United States*, 307 U. S. 125 ..... 24, 33, 44, 45
Second Employers' Liability Cases, 223 U. S. 1 38
Shields v. *Utah Idaho R. Co.*, 305 U. S. 177 32
Southern Railway Co. v. *United States*, 222 U. S. 20 34
St. Paul Bridge & Terminal Ry. Co. Control, 199 I. C. C. 538 27
Swayne & Hoyt, Ltd., v. *United States*, 300 U. S. 297 ..... 24, 33
Texas v. *United States*, 292 U. S. 522 18
Texas & New Orleans R. R. Co. v. *Brotherhood of Railway and S. S. Clerks*, 281 U. S. 548 34
Texas & Pacific Ry. Co. v. *Rigsby*, 241 U. S. 33 34
Unification of Southwestern Lines, 124 I. C. C. 401 20
United States v. *Chicago, etc., R. Co.*, 282 U. S. 311 ..... 41, 45, 47
United States v. *Louisville & Nashville R. R.*, 235 U. S. 314 ..... 44, 46
United States ex rel. Chicago, etc., R. R. Co. v. *Interstate Commerce Commission*, 294 U. S. 50 45
Virginian Ry. v. *Federation*, 300 U. S. 515 ..... 34, 37
Wichita R. R. v. *Public Utilities Comm.*, 260 U. S. 48 ..... 16, 41, 42
Wilson v. *New*, 243 U. S. 332 34

Statutes: Page

Interstate Commerce Act as amended, c. 104, 24 Stat. 379, U. S. C., Title 49:
- Sec. 1 (20) ... 17
- Sec. 5 (4) (a) ... 3
- Sec. 5 (4) (b) ... 3, 13, 16, 18, 32, 40
- Sec. 7 (b) ... 29

Judicial Code, Sec. 238, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, U. S. C., Title 28, Sec. 345 ... 2

Railroad Retirement Acts of 1934 and 1935, 48 Stat. 1283, 49 Stat. 967 (U. S. C., Title 45, Secs. 201 et seq) ... 34

Railway Labor Act of 1926 and its amendment in 1934 (44 Stat. 577, 48 Stat. 1185, U. S. C., Title 45, Secs. 151–163) ... 34

Urgent Deficiencies Act of October 22, 1913, c. 32, 28 Stat. 219, 220, U. S. C., Title 28, Secs. 45 and 47 (a) Supp. III ... 2, 13, 39

Miscellaneous:

House Doc. No. 394, 74th Cong., 2d Sess:
- Pp. 51–52 ... 29, 30
- P. 56 ... 36

H. R. 11609, 74th Cong., 2d Sess., p. 38 ... 23

H. Rep. No. 456, 66th Cong., 1st Sess., p. 28 ... 17

H. Rep. No. 1217, 76th Cong., 1st Sess, p. 32 ... 32

Interstate Commerce Commission, 49th Annual Report:
- Pp. 37–38 ... 30
- P. 97 ... 30

Interstate Commerce Commission, 50th Annual Report, p. 107 ... 31

S. Rep. No. 304, 66th Cong., 1st Sess., pp. 19–20 ... 17

S. Rep. No. 433, 76th Cong., 1st Sess., p. 29 ... 31

S. Rep. No. 2009, 76th Cong., 1st Sess ... 31

Sharfman, *The Interstate Commerce Commission*, Vol. III–A, p. 434 ... 18

Simpson, *The Interstate Commerce Commission and Railroad Consolidation*, 43 Harv. L. Rev. 192 ... 18

55 Traffic World 293 ... 28

56 Traffic World 230 ... 28

57 Traffic World 995 ... 28

In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 343

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

FRANK O. LOWDEN, JAMES E. GORMAN, AND JOSEPH B. FLEMING, AS TRUSTEES, ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the specially constituted District Court (R. 37) has not been reported. The two reports of the Interstate Commerce Commission (R. 8, 18) are reported in 230 I. C. C. 181 and 233 I. C. C. 21.

JURISDICTION

The final decree of the District Court was entered July 21, 1939 (R. 43). Petition for appeal was

filed August 28, 1939, and was allowed the same day (R. 44, 47). Jurisdiction is conferred on this Court by the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 219, 220 (U. S. C., Title 28, Secs. 45 and 47 (a), Supp. III), and by Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936 (U. S. C., Title 28, Sec. 345). Probable jurisdiction was noted by this Court on October 16, 1939.

QUESTIONS PRESENTED

I

Whether the power conferred upon the Interstate Commerce Commission by Section 5 (4) (b) of the Interstate Commerce Act to authorize the lease of one railroad by another "subject to such terms and conditions and such modifications as it [the Commission] shall find to be just and reasonable," includes the power to prescribe conditions providing that employees who are discharged or transferred as the result of a lease should receive partial compensation for their loss.

II

Whether, if the first question be answered in the negative, the District Court had power to annul and enjoin the conditions prescribed by the Commission and leave outstanding an order authorizing the lease without the conditions.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act (c. 91, 48 Stat. 217, U. S. C., Title 49, Sec. 5 (4)), are as follows:

> (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b), for two or more carriers to consolidate or merge their properties, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through purchase of its stock; or for a corporation which is not a carrier to acquire control of two or more carriers through ownership of their stock; or for a corporation which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock.
>
> (b) Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under subdivision (a), the carrier or carriers or corporation seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any

part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants, of the time and place for a public hearing. If after such hearing the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and will promote the public interest, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon the terms and conditions and with the modifications so found to be just and reasonable.

STATEMENT

This is a direct appeal by the United States and the Interstate Commerce Commission from a final decree of the United States District Court for the Northern District of Illinois, entered July 21, 1939, annulling and setting aside conditions attached to an order of the Interstate Commerce Commission entered April 3, 1939, under Section 5 (4) of the Interstate Commerce Act (R. 43). The Commission's order authorized the appellees to lease the properties of the Chicago, Rock Island & Gulf Railway Company until the termination of pending reor-

ganization proceedings under Section 77 of the Bankruptcy Act, subject, however, to four conditions. These conditions, which are set forth in full in the margin,[1] require appellees, if they elect

[1] "1. No employee of the trustees of The Chicago, Rock Island and Pacific Railway Company and the trustees of The Chicago, Rock Island and Gulf Railway Company, hereinafter designated as the carriers, who is continued in service shall, for a period of five years from the commencement of operation under the said lease but not beyond the date of termination, as to either carrier, of the reorganization proceedings under section 77 of the Bankruptcy Act, be placed, as a result of operation under said lease, in a worse position with respect to compensation and rules governing working conditions than he occupied at the date of commencement of operation under said lease, so long as he is unable in the exercise of his seniority rights under existing agreements, rules, and practices, to obtain a position producing compensation equal to or exceeding the compensation of the position held by him at the date of commencement of such operation; that so long as he is unable to obtain a position with said trustees yielding compensation equal to or exceeding his compensation at the time of the commencement of said operation, he shall be entitled to a monthly allowance equal to the difference between the monthly compensation of the position in which he is retained and the compensation of the position in which he was displaced, the latter monthly compensation to be considered one-twelfth of the total compensation received by him in the twelve months prior to his displacement, less compensation at the rate of compensation of his retained position for any time lost on account of his voluntary absences, provided, however, that the employee's compensation which it is the purpose of this condition to guarantee shall in no case exceed that which he received in the 12 months prior to his displacement, reduced by any change in wage scales or revision of rules detrimental to the employee, which change or revision is made to affect railroad employees generally; and provided further, that

to consummate the lease, to refrain for a period of five years from making any reduction in the salary of retained employees whose seniority rights might be affected by the lease, to pay an allowance

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nothing herein shall operate to affect in any respect the retirement on pension or annuity rights and privileges in respect of any of the employees; and provided further, that if any employee elects not to exercise his seniority rights he shall be entitled to no allowance.

2. Any employee of the carriers who is deprived of employment with said carriers, hereinafter designated as a dismissed employee, because of the abolishment of his position or the loss thereof as a result of the exercise of seniority rights by an employee whose position is abolished as a result of operation under said lease, shall be accorded a monthly allowance, designated dismissal allowance, based on length of service (except in the case of an employee with less than one year of service) equivalent to 60 percent of the average monthly compensation of said dismissed employee during the last twelve months of his employment in which he earned compensation prior to the date he is first deprived of employment; that this allowance be made to each eligible employee while unemployed during the period beginning with the date he is deprived of employment and extending in each instance for a length of time determined and limited by the following schedule, but not beyond the date of termination of the bankruptcy proceedings involving either carrier:

1 yr. and less than 2 yrs.	6 months
2 yrs. " " " 3 "	12 "
3 yrs. " " " 5 "	18 "
5 yrs. " " " 10 "	36 "
10 yrs. " " " 15 "	48 "
15 yrs. and over	60 "

provided, that a dismissal allowance shall cease prior to the expiration of the prescribed period in the event of failure of the employee without good cause to return to service after being notified by the trustees of a position for which he is eligible; and provided further, that the dismissal allowance of any dismissed employee who is otherwise employed

for a limited period to dismissed employees who are unable to obtain equivalent employment, and to reimburse transferred employees for traveling and other expenses involved in moving their places

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shall be reduced to the extent that his monthly earnings in such employment and his dismissal allowance exceed the amount upon which his dismissal allowance is based. An employee shall not be regarded as a dismissed employee in case of his resignation, death, retirement on pension, dismissal for good cause, or furlough because of reduction of forces due to seasonal requirements. A dismissal allowance shall cease prior to the expiration of the prescribed period in the event of resignation, death, retirement on pension, or dismissal for good cause.

3. Any employee who is retained in the services of the carriers, or who is restored to service from the group of employees entitled to receive a dismissal allowance, who is required to change the point of his employment as a result of operation under said lease, designated as a transferred employee, and who is required, within one year from the date of commencement of operation under said lease, to move his place of residence, shall be reimbursed for expenses of moving his household and other personal effects, for the traveling expenses of himself and his immediate family, and his own actual wage loss, not to exceed two days, the exact extent of the responsibility of the carriers to be agreed upon in advance by the said carriers and the employee affected, provided, however, that changes in places of residence subsequent to the initial change caused by the operation under said lease and which result from the exercise of seniority rights shall not be considered within the foregoing provision.

4. Any transferred employee who owns his home, or an equity therein, shall be protected against any loss suffered in the sale thereof, within one year of the effective date of operation under said lease, for not less than its fair value, said fair value to be determined as of a date 30 days prior to the filing of the application in this proceeding by the

of residence, including any loss incurred through being forced to sell their homes. The District Court annulled and set aside these conditions but expressly declined to pass upon the validity of the Commission's order with the conditions annulled and set aside.

Proceedings before the Commission

Appellees are trustees in reorganization proceedings under Section 77 of the Bankruptcy Act of the Estates of The Chicago, Rock Island & Pacific Railway Company (hereinafter called "Rock Island Company") and of The Chicago, Rock Island & Gulf Railway Company (hereinafter called "Gulf Company"). On November 8, 1937, appellees, as trustees of the Gulf Company, filed with the Interstate Commerce Commission an application under

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carrier, and such fair value to be agreed upon by the carriers and each employee prior to such sale; and if any transferred employee holds an unexpired lease of a dwelling occupied by him as a home, the carriers shall protect him from loss and cost in securing cancellation of his said lease.

The carriers and the employees should be able to agree upon rules and procedure to make effective the intent of the foregoing conditions, such intent being to prevent, for the designated periods, reduction in salaries of retained employees, to provide an allowance for employees who are dismissed as a result of operation under the lease and who are unable to secure other employment, and to reimburse transferred employees for expenses and losses incurred in connection with the transfer of their place of residence made necessary because of the operation under said lease" (R. 14–16).

Section 5 (4) of the Interstate Commerce Act for authority to lease the properties of the Gulf Company to the Rock Island Company, and, as trustees of the Rock Island Company, applied for authority to enter into and accept such lease (R. 9). The Rock Island owns all of the Gulf Company's outstanding capital stock and, subject to pledge, all of its outstanding bonds (R. 9). The Gulf Company's properties, consisting of 632 miles of railway located entirely in the State of Texas, are operated separately from the 8,138 miles of railroad operated by the Rock Island (R. 9). The purpose of the lease is to combine the operations of the two carriers in order to effectuate savings in operating costs through the elimination of the accounting office now maintained by the Gulf Company at Fort Worth, Texas (R. 10).

On October 29, 1938, after full hearing and oral argument, Division 4 of the Commission issued its report (R. 8), finding that, subject to the conditions set forth above for the protection of the employees who would be affected, the lease would promote the public interest and should be approved. No order was entered pending notice to the Commission that the appellees would accept the conditions.

Subsequently the case was reargued before the entire Commission, and on April 3, 1939, the Commission issued its report affirming the report of Division 4 and directing that an order be entered

approving the lease subject to the conditions prescribed (R. 18).

The Commission found, among other things, that the proposed lease would not impose upon the public any conditions pertaining to the transportation of freight different from those now in effect, would result in no change of service to the public, and would have no effect on rates or routes (R. 10, 19). It further found that upon approval of the lease the appellees could eliminate the duplicate accounting now necessary because of the requirement of Texas law that the Gulf Company, a Texas corporation, maintain an accounting office in that State (R. 10, 19). It found that elimination of this accounting office would result in an annual saving of $100,000, to be effected through the dismissal of 49 employees and the transfer of 20 other employees to the Chicago office of the Rock Island (R. 10, 19).

The Commission affirmed the finding of Division 4 "that the duplicate accounting necessary under the present plan of operating the two properties requires excessive expenditures which are not in the public interest and which are a burden on interstate and foreign commerce" (R. 19). It further affirmed the finding of Division 4 that the welfare of the employees affected is one of the matters of public interest which the Commission must consider in proceedings under Section 5 (4) and that the conditions imposed upon its authorization of the lease are proper and relate to a subject matter within its jurisdiction (R. 23).

The Commission's ultimate finding is as follows (R. 23):

> Accordingly, we find that, subject to the conditions prescribed in the previous report herein dated October 29, 1938, the proposed lease by Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, trustees in reorganization proceedings of The Chicago, Rock Island and Pacific Railway Company, of the properties of The Chicago, Rock Island and Gulf Railway Company, of which they are also trustees in reorganization proceedings, upon the terms and conditions proposed, will be in harmony with and in furtherance of our plan for the consolidation of railroad properties, and will promote the public interest, and we will enter an appropriate order, effective 40 days from its date.

The order approves and authorizes the lease "upon the terms and conditions proposed and upon the conditions prescribed in the report of division 4" (R. 25).

The cost to the appellees of carrying out the conditions with respect to dismissal allowances to discharged employees would be approximately $280,758 over a period of five years, and compliance with the other conditions would cost appellees not less than $10,000 (R. 36).

Proceedings in the District Court

Appellees filed this suit in the District Court on May 24, 1939, praying that the Court set aside and annul the conditions and enjoin their enforcement

on the ground that the Commission had no statutory power to impose them and that they impair appellees' constitutional rights (R. 1–8). The answers of the United States and of the Interstate Commerce Commission deny that the conditions are unauthorized or unconstitutional and challenge the court's power to segregate the conditions from the order as a whole and to annul them without annulling the entire order (R. 26, 28).

Final hearing was held on July 12, 1939, before a statutory court of three judges. On July 31, 1939, the court filed its findings of fact, conclusions of law and opinion, holding the conditions to be unauthorized and sustaining its power to annul the conditions apart from the order as a whole (R. 37). The final decree annuls and sets aside the conditions attached to the Commission's order, permanently enjoins the appellants from enforcing them, but expressly leaves open the question of the validity of the order with the conditions deleted (R. 43).

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In holding and deciding that the conditions referred to in, and made a part of, the order of the Interstate Commerce Commission dated October 29, 1938, and affirmed by the entire Commission on April 3, 1939, are beyond the power of the Commission to impose, and are illegal and void.

2. In holding and deciding that the plaintiffs are entitled to an order enjoining, setting aside, annul-

ling, and suspending that part of the order of the Interstate Commerce Commission which refers to and consists of the conditions, and in perpetually restraining and enjoining the defendants, their officers, agents, and attorneys, from enforcing, or attempting to enforce that part of the order.

3. In holding and deciding that it had power, under the provisions of the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 220), to enjoin, annul, and set aside the conditions without enjoining, annulling, or setting aside the order in its entirety.

4. In substituting its judgment for that of the Commission upon an administrative matter, and in approving in effect the lease of one railroad by another upon terms and conditions different from those found necessary by the Commission.

SUMMARY OF ARGUMENT

I

The District Court, in ruling that the conditions imposed by the Commission were not in the public interest and were therefore invalid, misconstrued Section 5 (4) (b) of the Interstate Commerce Act. That section requires the Commission, in determining whether it should authorize acquisitions of control, to decide *first*, whether the proposal is in harmony with the Commission's general consolidation plan; *second*, whether the proposal "will promote the public interest" from the transportation stand-

point; and *third*, whether the terms and conditions of the proposal are "just and reasonable" to all parties affected thereby. It is not enough for the Commission to find that the proposal will promote the public interest; it must also find that the terms and conditions of the proposal are just and reasonable to all parties concerned.

The proposed lease which the Commission was here asked to authorize contemplated economies to be effected solely through the reduction of personnel and the transfer of employees. The vital interest of the employees in this proposal and its direct effect upon them is obvious. Under these circumstances the proposal could not be found to be just and reasonable unless it provided for the protection of those at whose expense it was to be effectuated.

There can be no substantial doubt that the conditions prescribed by the Commission to assure such protection to employees are just and reasonable. The conditions are designed to mitigate the financial injury which will be suffered by the employees if the proposal is effectuated. Furthermore, the terms of the conditions are in accord with the agreement now in effect between a number of the principal railroads and their employees as to the protection to be afforded employees when consolidations are required in the interests of economy.

However, if the Commission is restricted to imposing only such conditions as promote the public interest in transportation, we submit that the present conditions also meet that test. The purpose of

the conditions is to guard the welfare of an employee group by ameliorating the imminent financial injury contemplated by a proposed lease. Not only is such protection necessary to the maintenance of high morale among all railroad employees, but it is essential if potential labor disputes and consequent disruptions of transportation service are to be avoided.

We think no constitutional objections to the conditions can be advanced. If such objections are raised, what has been said above in regard to the reasonableness of the conditions and their relation to interstate transportation is a complete answer.

II

If it is held that the court below was correct in invalidating the conditions, we submit that the court nonetheless erred in enjoining their enforcement and leaving the remainder of the authorization outstanding. The conditions are an inextricable part of the Commission's order. If the conditions are invalid, it was the duty of the court upon so finding to remand the proceeding to the Commission for the further exercise of its judgment in accordance with the principles announced by the court. The duty of making the requisite statutory findings and granting the authorization was vested by Congress in the Commission. The courts are without authority to rewrite the Commission's findings or to authorize a lease which the Commission has not approved. *Wichita*

R. R. v. *Public Utilities Commission*, 260 U. S. 48; *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464.

ARGUMENT

I

THE CONDITIONS IMPOSED ARE A VALID EXERCISE OF THE COMMISSION'S AUTHORITY UNDER SECTION 5 (4) (B) OF THE INTERSTATE COMMERCE ACT

1. Section 5 (4) (b) authorizes the Commission to impose any conditions which are "just and reasonable" in relation to the transaction involved.

The decision of the court below is predicated upon the premise that, under Section 5 (4) (b) of the Intersfate Commerce Act, the Commission has authority to impose only such conditions as "'will promote the public interest'' from the standpoint of transportation service. Proceeding from this premise, the court concluded that the conditions here involved were unauthorized because they deal with "the private employer-employee relationship" (R. 42) rather than with "the public interest." We challenge both the premise and the conclusion.

Section 5 (4) (b) does not limit the authority of the Commission to the imposition of conditions which will promote the public interest through betterment of transportation service; to the contrary, the statute in express terms gives the Commission power to impose any conditions, germane to the transaction, which are "just and reasonable." The pertinent provision follows:

> If after such hearing the Commission finds that, *subject to such terms and conditions and such modifications as it shall find to be just and reasonable,* the proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and will promote the public interest, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, *upon the terms and conditions and with the modifications so found to be just and reasonable.*[2] [Italics supplied.]

Analysis of this section [3] indicates that the Com-

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[2] Compare the language of this section, giving the Commission power, in authorizing acquisitions of control, to impose such conditions as it finds to be "just and reasonable," with the language of Section 1 (20) of the Act (c. 91, 41 Stat. 478, U. S. C., Title 49), giving the Commission power, in authorizing extensions or abandonments of lines, to attach such conditions "as in its judgment the public convenience and necessity may require." In considering proposals for the abandonment of lines under Section 1 (20), the Commission has construed that section as not permitting it to attach conditions requiring compensation to be paid to discharged employees. See *Chicago G. W. Ry. Co. Trackage*, 207 I. C. C. 315; *Delaware River Ferry Co. of New Jersey Abandonment*, 212 I. C. C. 580; *Quincy, O. & K. C. Ry. Co. Abandonment & Control*, 233 I. C. C. 471.

[3] The Committee reports throw no light upon the interpretation of this section. H. Rep. No. 456, 66th Cong., 1st Sess., p. 28; S. Rep. No. 304, 66th Cong., 1st Sess., pp. 19–20. And we have found nothing in the relevant parts of the Congressional debates which illuminates the intent of Congress.

mission, in determining whether it should approve or disapprove projected acquisitions of control, is required to pass upon three distinct questions: first, whether the proposal is in harmony with its consolidation plan; second, whether the proposal "will promote the public interest" from the standpoint of transportation service;[4] and third, whether the terms and conditions of the proposal, as between the parties involved and in their effect upon parties directly affected, are just and reasonable. Sharfman, *The Interstate Commerce Commission*, Vol. III–A, p. 434; *Cleveland, C. C. & St. L. Ry. Co.* v. *Jackson*, 22 F. (2d) 509 (C. C. A. 6th); *Nueces Valley Townsite Co.* v. *San Antonio U. & G. R. Co.*, 67 S. W. (2d) 215, 221 (Tex. Sup. Ct.); Simpson, *The Interstate Commerce Commission and Railroad Consolidation*, 43 Harv. L. Rev. 192, 224. The Commission is authorized to approve a projected acquisition of control only if it finds that the transaction promotes the public interest from the standpoint of transportation service *and* if it finds that the transaction is just and reasonable to all parties involved and directly affected, either upon the terms proposed by the applicant or subject to conditions imposed by the Commission.

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[4] This Court has held that the term "public interest," as used in Section 5 (4) (b), has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities. *Texas* v. *United States*, 292 U. S. 522; *New York Central Securities Corp.* v. *United States*, 287 U. S. 12.

The considerations determining whether a particular transaction tends to improve transportation service may, in some circumstances, be very different from those determining whether the terms and conditions of a transaction are just and reasonable. Involved in the decision of the first question are such matters as the effect of the proposed acquisition upon competition and upon existing channels of trade, the economies which are likely to flow from the unification, and the improvement of traffic strength and of service to shippers which may result. These are all matters directly related to the public interest in adequate transportation service. But the Commission's authority clearly does not end there. Even if it finds that, from a transportation standpoint, the proposed transaction is acceptable, it must further find that the terms upon which the transaction is to be carried out are just and reasonable. This involves determination of such questions as the fairness of the consideration as between the acquiring and acquired companies, the fairness of the treatment accorded minority security holders, and the fairness of the treatment accorded other groups immediately affected, including, in our view, the employees of the acquiring and acquired companies. These are matters to be considered on their own merits, without regard to their immediate effect upon actual transportation service.

The Commission has consistently recognized the dual character of the obligations imposed upon it

by Section 5 (4) (b). Perhaps the most striking example is its decision in *Nickel Plate Unification*, 105 I. C. C. 425, which involved a proposed acquisition of control of five railroad companies by the New York, Chicago & St. Louis Railway Co. The Commission stated that the principal questions in the proceeding were two: "(1) Are the proposed acquisitions of control in the public interest and (2) are the considerations, terms, and conditions of the proposed acquisitions of control just and reasonable?" (p. 430). The first question was answered in the affirmative, the Commission stating that "from a transportation standpoint, we find that the proposed acquisitions of control are in the public interest" (p. 440). Despite this finding, the application was denied on the ground that the terms of the proposed acquisitions were unfair to minority stockholders of two of the railroads to be acquired and that voting power was unfairly distributed.[5] See also *Unification of Southwestern Lines*, 124 I. C. C. 401.

There is no rational basis for distinguishing between the interests of minority stockholders and the interests of employees insofar as either group is affected by a proposed consolidation.

[5] There is language in the Commission's report which might be construed as indicating that the Commission was also of the opinion that the conditions would promote the public interest. If the Commission did reach that conclusion, it did so only in supporting its determination that the conditions were just and reasonable.

If the Commission can protect one group, it certainly can protect the other.

The decision of the court below, construing the statute to require approval of any transaction which promotes the public interest from the transportation standpoint, irrespective of the terms upon which the transaction is to be effectuated, in effect strips the Commission of all power to protect minority interests and to assure that the acquisition is just and reasonable to all concerned. This interpretation is in conflict not only with the language of Section 5 (4) (b) but also with the whole philosophy underlying the Transportation Act of 1920. Its adoption would, we believe, lead to untold mischief in the future development of railroad unification.

The decision below is inconsistent with other decisions relating to the scope of the Commission's power to prescribe reasonable terms and conditions. In *Cleveland, C. C. & St. L. Ry. Co.* v. *Jackson*, 22 F. (2d) 509, the Circuit Court of Appeals for the Sixth Circuit stated (pp. 510–511):

> It is clear, we think, and, indeed it is not denied, that a lease like the one involved here, if approved by the stockholders of both companies and executed on behalf of those companies, could have no effect until the Commission found that the making of the lease would "be in the public interest," and until it approved, not only the terms and conditions of the lease, but the consideration

> therefor, finding that such terms, conditions and consideration were "just and reasonable in the premises." The plaintiff doubts that in determining the reasonableness of the terms the Commission has the right to consider the interest of minority stockholders, but admits that it "has assumed such jurisdiction, although never confirmed by any court decision." We think it is the duty of the Commission to protect both the public and private interests, and although it finds that the acquisition will be in the public interest, it may not approve the lease unless it further finds that the consideration, terms and conditions thereof are just and reasonable—just to the lessor, the lessee, and necessarily to the stockholders of each. The ruling in the Nickel Plate Case, 105 Interst. Com. Com'n R. 425, evidences such an interpretation of its duties by the Commission.*

Similarly, in *Nueces Valley Townsite Co.* v. *San Antonio U. & G. R. Co.*, 67 S. W. (2d) 215, the Supreme Court of Texas stated concerning this section of the Act (p. 221):

> Congress has declared that, when control over one carrier is acquired by another, it must be (1) in the public interest, and (2) that the consideration and terms and conditions of such acquisition must be just and

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* Accord: *General Investment Co.* v. *New York Central R. R.*, N. D. Ohio, Eq. No. 1180, decided October 24, 1924 (unreported); *New York Cent. Securities Co.* v. *Cleveland, C. C. & St. L. Ry. Co.*, N. D. Ohio, Eq. No 1163, decided October 24, 1924 (unreported).

reasonable to those whose private rights are affected.

The case, therefore, presents initially a very different question from that considered and decided by the court below. That issue is not whether the protection of employees adversely affected by a unification of railroad lines promotes transportation service, but whether it is "just and reasonable" in the premises.

We make no contention, of course, that the Commission's power to impose conditions upon acquisitions of control is unlimited. To the contrary, since the conditions which it imposes must obviously be germane to the transaction which it is asked to approve, its jurisdiction is necessarily of narrow scope. There are but few parties or groups whose interests are directly affected by an acquisition of control and it is only the interests of those who are directly affected which the Commission is authorized to protect.

We believe it to be beyond challenge that employees of an acquiring or acquired railroad are among those immediately concerned in the terms of acquisition. Indeed, the President of the Association of American Railroads estimated that about 75% of the savings effected by the coordination of facilities comes from a reduction in labor costs. Hearings before Committee on Interstate and Foreign Commerce on H. R. 11609, 74th Cong., 2d Sess., p. 38. Under these circumstances, we submit that no proposed acquisition of control can fairly be deemed

just and reasonable unless it provides for the protection of labor, and that the Commission's power to impose just and reasonable conditions must comprehend authority to withhold approval of a projected acquisition unless such protection is afforded.

2. The Conditions Imposed are "Just and Reasonable"

The Commission expressly found that the conditions which it imposed for the protection of employees were "just and reasonable" in the premises.[1] That finding may not be disturbed if it can be supported upon any rational basis. *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286–287; *Swayne & Hoyt, Ltd.*, v. *United States*, 300 U. S. 297, 303 *et seq.*; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146.

Appellees do not attack the sufficiency of the evidence on which the Commission's findings were based and that evidence was not submitted to the court below for review. In *Mississippi Valley Barge Line Co.* v. *United States*, *supra*, this Court said (p. 286):

> The settled rule is that the findings of the Commission may not be assailed upon appeal in the absence of the evidence upon which they were made.

The evidence not having been submitted to the court below, the sole question for consideration is

[1] The further finding of the Commission that the conditions were "in the public interest" is discussed at pp. 32–37, *infra*.

whether the Commission's findings and conclusions were so patently arbitrary and unreasonable that there could have been no rational basis for its decision. The answer is plain.

The reports of Division 4 and of the full Commission (R. 8, 18) reveal that the primary justification for the proposed lease was an estimated saving of $100,000 a year to the railroads concerned, to be effected solely at the expense of the employees in the accounting department of the lessor company. Some of these employees were to be dismissed and others transferred. The Commission found that hardship would be imposed both on those to be dismissed and those to be transferred, and upon their families, not only through termination or reduction of their compensation, but also because the dismissals and transfers would result in at least a partial loss to the employees of their investments in property of an estimated value of $175,000, of which $44,000 was unpaid.

The Commission concluded that it was just and reasonable that the saving to the railroads to be accomplished by reduction of the pay rolls should be shared for a time with the employees at whose expense it was to be brought about (R. 22). Consequently the Commission prescribed the conditions here under review which prevent reduction of compensation of retained employees, provide partial compensation for a limited period for dismissed employees unable to obtain equivalent employment,

and provide for reimbursement to transferred employees for the cost of moving their places of residence, including any loss incurred through being forced to sell their homes. In prescribing these conditions, the Commission stated (R. 23):

> We are simply attempting in the public interest reasonably to protect those employees of the applicants who may be adversely affected economically by the grant of authority herein against unavoidable but unreasonable and unjust burdens which are not in the public interest.

The Commission has several times given expression to this view. In its report entitled *Consolidation of Railroads*, 185 I. C. C. 403, issued in 1932, the Commission stated (p. 427):

> In working out the modified plan herein approved it is expected that carriers will give careful consideration to the interests of their employees with the view of avoiding the imposition of undue hardships upon them in connection with the relocation and consolidation of shops and offices. When applications under section 5 of the act may be filed for our approval, the applicants will be expected to deal adequately with these questions and, to the extent necessary and warranted by the record, we will consider the imposition of such conditions as we may find to be proper and within our jurisdiction. If any doubt exists as to our jurisdiction in the premises it should be safeguarded by Congress.

Subsequently, in *St. Paul Bridge & Terminal Railway Co. Control,* 199 I. C. C. 588, the Commission reconsidered the whole question, again concluded that conditions designed to protect labor in proceedings under Section 5 (4) were both authorized and proper, and proceeded to impose conditions not unlike those here involved. To the same effect are the decisions of the Commission in *Louisiana & Arkansas Ry. Co. Merger,* 230 I. C. C. 156; *Louisiana & Arkansas Ry. Co. Control,* 233 I. C. C. 123; and *Louisiana & Arkansas Ry. Co. Merger,* 233 I. C. C. 37. The present case once more provided opportunity for complete reconsideration of the question, and the result was reaffirmance of the Commission's earlier conclusion.

It is significant that this conclusion is supported by the judgment of those most familiar and most directly affected by the problem. This is clearly pointed out in the concurring opinion of Commissioner Eastman, in which he states (R. 24):

> The protection of the employees for which the condition provides is substantially the same in character as the protection to which the great majority of the railroads agreed in May 1936, after prolonged negotiations with representatives of the employees, and that agreement is still outstanding. Furthermore, the so-called Committee of Six, which included three railroad executives, in their report to the President on December 23, 1938, with respect to the transportation problem, recommended that the Federal

> agency passing upon railroad consolidations "require, as a prerequisite to its approval, a fair and equitable arrangement to protect the interests of the said employees"; and I understand that the recommendations of the Committee of Six have been approved by the directors of the Association of American Railroads. * * *

The agreement of May 1936, referred to by Commissioner Eastman, was an agreement between representatives of 219 railroads and 21 railway labor organizations, providing, in the event of consolidations, for payment of dismissal compensation, expenses of transfer, and protection against loss in the sale of homes. 57 Traffic World 995 (1936). Even before this general agreement was reached its principle had been adopted by some of the leading railroad companies of the country. The Baltimore and Ohio Railroad and its employees, for example, reached an agreement whereby an amount equal to the first year's savings from trackage rights acquired over another railroad was used to pay dismissal compensation to discharged employees. 55 Traffic World 293 (1935). Similarly, the Union Pacific Railroad Company, in effecting a consolidation with four subsidiaries, reached an agreement with its employees providing for one year's full salary dismissal compensation for discharged employees, a guarantee against reduction in compensation for employees retained in new positions, payment of transportation expenses in moving, and protection of employees owning homes

against loss. 56 Traffic World 230 (1935). This recognition by the railroads themselves that employees have a vital interest in the unification of operations and that such unification should properly be accompanied by provision for the protection of discharged and transferred employees, provides, we believe, support of the most substantial character to the finding of the Commission in the present case that the prescribed conditions are "just and reasonable."

Moreover, this finding finds equally strong support in the declared legislative policy of Congress. Section 7 (b) of the Emergency Railroad Transportation Act of 1933 (48 Stat. 214, U. S. C., Title 49, Sec. 257 (Supp. 1938)), provided that the number of employees in the service of a carrier should not be reduced, nor should any employee be placed in a worse position with respect to compensation, by reason of any action taken under the Act, including the approval of consolidations. Although the provisions of the Act were of only temporary duration, expiring on June 17, 1936, they clearly indicate Congressional recognition of the reasonableness and justice of protecting railway labor against the hardship inherent in the displacement and transfer of employees through the unification of operations.[8]

[8] The provisions of Section 7 (b) of the Emergency Railroad Transportation Act of 1933 was in general modeled on action taken in Great Britain in 1921 when the consolidation of the British railways into four systems was required. The Act providing for this consolidation contained provision for

Even more direct recognition of the necessity for this policy was given by Congress at its last regular session. In order to assure that it had the necessary statutory power, the Commission, in its reports to Congress for the years 1935 and 1936, recommended enactment of "further statutory provisions to protect employees from undue financial loss as a consequence of authorized railway abandonments or unifications." 49th Annual Report of the Interstate Commerce Commission, pp. 37–38, 97; 50th Annual Report of the Interstate Commerce Commission, p. 107.* Pursuant to this recommenda-

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reimbursement of employees for loss from displacement or reduction in compensation. See House Doc. No. 394, 74th Cong., 2d Sess., pp. 51–52.

*In its 49th Annual Report the Interstate Commerce Commission stated (pp. 37–38):

"It follows as a consequence of such abandonments or unifications that sometimes employees are transferred from one location to another and in some cases are dismissed from the service. * * * In individual cases the financial sacrifices involved are calamitous. In some cases the carriers concerned have voluntarily effected arrangements satisfactory to the employees; in others we were able to impose protective provisions in our orders; but in still others we lacked the statutory authority to impose conditions which just treatment of employees appeared to require. *This refers particularly to relocation or abandonment of shops.* We recommend *further* statutory provisions to protect employees from undue financial loss as a consequence of authorized railway abandonments or unifications found to be in the interest of the general public, or otherwise lawfully effected." [Italics supplied.]

It is apparent from this statement that the Commission's doubt with respect to its statutory power to impose conditions for the protection of labor primarily concerned its

tion, both the Senate and the House of Representatives, during the first session of the 76th Congress, passed general railroad bills, now in conference, containing the following provision (S. 2009 and House substitute for S. 2009):

> The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interests of the employees affected.

We do not believe that passage of these bills by the Senate and House is any indication that Congress interpreted the present Act as not authorizing the Commission to impose conditions to protect labor.[10] The passage of the bills is more logi-

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power to impose such conditions under Section 1 (20) of the Act relating to abandonments. As previously pointed out (see note 2, *supra* p. 17), the Commission has ruled that under the provisions of Section 1 (20) it has no power to impose conditions to protect labor while, under the provisions of Section 5 (4) here involved, its consistent ruling has been that it has such power (see pp. 26–27, *supra*).

The 50th Annual Report of the Commission merely incorporated by reference the recommendation for enactment of "further statutory provisions to protect employees" (p. 107).

[10] The committee reports with respect to this matter are not conclusive. The Report of the Senate Committee on Interstate Commerce (S. Rep. No. 433, 76th Cong., 1st Sess., p. 29) states with reference to this section: "The provisions referred to immediately above were included pursuant to the recommendations of the Report of the Committee of Six (p. 30). There are no similar provisions in existing law." The statement that there are no similar provisions

cally to be regarded as intended simply to remove all possible doubt that the Commission has this power and to direct that the power should be exercised in every case. Cf. *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177. In our view, this direction in the proposed legislation that in every proceeding the interests of employees must be protected is convincing proof that the granting of such protection in the present case was just and reasonable and, consequently, was within the statutory authority of the Commission.

3. The Conditions Imposed are in the Public Interest

If we are wrong in our construction of Section 5 (4) (b) as authorizing the Commission to impose just and reasonable conditions, irrespective of the immediate effect of such conditions upon the public interest in transportation service, the case, on the

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in existing law is not inconsistent with the view that Section 5 (4) gives the Commission authority to prescribe such conditions as are here involved. The proposed bill provides that in every case the Commission shall require as a prerequisite to its approval that there be a fair and equitable arrangement to protect the interests of employees. There is no express provision to this effect in existing law, and, although we believe that Section 5 (4) must be construed to *authorize* the Commission to impose such conditions when it believes such action warranted, the section, as it now stands, does not *require* the Commission to do so in every case. The provisions of the proposed legislation are, therefore, obviously different from the law presently existing.

The Report of the House Committee on Interstate and Foreign Commerce (H. Rep. No. 1217, 76th Cong., 1st Sess.) throws no light whatever on the question (p. 12).

merits, is narrowed to the question considered by the court below, *i. e.*, whether the conditions under review are germane to the maintenance of an adequate and efficient railroad system. This, like the question of whether the conditions are "just and reasonable", involves an issue of administrative fact, the determination of which Congress has delegated to the Commission.

In the present case, the Commission has determined that the conditions prescribed are not only just and reasonable but also that they "will promote the public interest" (R. 23). As stated above, this determination may not be disturbed unless it is without any rational basis. *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282, 286–287; *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 303 *et seq.*; *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 146. That there is a rational basis for the holding we believe to be evident from the Commission's findings and report and from the established determination of Congress that there is a direct relationship between the welfare of railroad employees and the maintenance of an efficient transportation system.

Enactments of Congress directed primarily to the welfare of railway employees are numerous. The hours of service of such employees have been limited (*Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission,* 221 U. S. 612), and, dur-

ing an emergency, their wages have been fixed. *Wilson* v. *New*, 243 U. S. 332. Safety appliance measures designed primarily or exclusively to assure the safety of railway employees have been enacted. See *Southern Railway Co.* v. *United States*, 222 U. S. 20; *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33. And steps have been taken to assure the maintenance of harmonious labor relations, culminating in the passage of the Railway Labor Act in 1926 and in its amendment in 1934 (44 Stat. 577, 48 Stat. 1185, U. S. C., Title 45, §§ 151–163). *Texas & New Orleans R. R. Co.* v. *Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548; *Virginian Ry.* v. *Federation*, 300 U. S. 515. Congress has also enacted retirement and pension legislation—the Railroad Retirement Acts of 1934, 1935, and 1937 (48 Stat. 1283, 49 Stat. 967, 50 Stat. 307, U. S. C., Title 45, §§ 201–214, 228 (a)–(r)). Although the 1934 Act was invalidated by this Court in *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, the general legislative policy which it embodied has been accomplished in the 1935 and 1937 Acts, enacted primarily under the taxing and spending powers of Congress. The enactment of these statutes clearly indicates what Congress conceives to be necessary or advisable to promote the adequacy and efficiency of the transportation system.

We believe that, in the light of this legislative history, the fundamental proposition that the wel-

fare and morale of railroad employees is vitally connected with the "public interest" in transportation service cannot be successfully challenged. Only the narrow issue remains, therefore, as to whether the conditions prescribed are reasonably related to the maintenance of such welfare and morale.

The facts already recited clearly indicate that the Commission's affirmative determination of this issue has substantial support. The Commission, by Section 5 (2) of the Act, is under a Congressional mandate to "prepare and adopt a plan for the consolidation of the railway properties * * * into a limited number of systems" as soon as practicable. The unification thus directed will result in tremendous savings in operating cost, but, it has been estimated, 75% of these savings will be at the expense of labor (see page 23, *supra*). This means that, unless the Commission is authorized to impose conditions to protect labor from the burden of consolidations which it approves, the employees of all railways will be under a constant threat of sudden loss of employment, with a consequent disrupting effect upon their morale. Clearly the maintenance of a high morale among railroad employees is as necessary to the efficiency of the transportation system as is the elimination of unnecessary operating costs. See *Associated Railways Company Acquisition*, 228 I. C. C. 277, 368.

Moreover, any device designed to obtain economy at the expense of labor contains the seeds of potential dispute. The history of the labor movement is replete with instances of strikes and violence resulting from the resistance of labor to the effectuation of economies through the elimination of employees. If the Commission has no power to protect the interests of labor when authorizing consolidations, it may be faced with the alternative of either carrying out the mandate of Congress and leaving labor to protect itself, or refusing to grant any authorization which will adversely affect employees. The result of either course would be to retard the development of an adequate and efficient transportation system.

These are not fancied difficulties but actualities recognized by all who have dealt with the problem. The Federal Coordinator of Transportation, in his Fourth Report transmitted to Congress, recommended the enactment of a comprehensive system of dismissal compensation, stating that he believed it could be shown that such a system "would enhance the safety or efficiency of railroad service" (H. Doc. No. 394, 74th Cong., 2d Sess., p. 56). As previously pointed out, the railroads themselves recognized the validity of this conclusion when, in May 1936, representatives of 219 lines and 21 labor organizations agreed to a system for the protection of labor in the event of consolidations (see p. 28, *supra*). It can scarcely be argued that a matter so vitally concerning the relationship between the

railroads and their employees as to call for a general agreement between all the major lines and all the major railway labor organizations has no bearing upon the public interest in transportation service. Cf. *Virginian Ry.* v. *Federation*, 300 U. S. 515, 552. Indeed, the argument would seem foreclosed by the fact that Congress, in enacting the Emergency Transportation Act of 1933 and in passing general railroad bills during the last regular session, made provision for the protection of labor in the type of situation here presented, thus clearly expressing its view as to the direct relationship between railroad transportation and the protection of those whose labor makes such transportation possible (see pp. 29–31, *supra*).

Under these circumstances, we submit that there is clearly a "rational basis" in fact for the Commission's conclusion in the present case that the conditions prescribed were necessary to protect the public interest in the suitable maintenance of an efficient transportation system.

4. The Conditions Imposed Do Not Impair the Constitutional Rights of the Appellees

The considerations advanced in the preceding sections of this brief dispose, we believe, of the constitutional arguments advanced by appellees. Since the conditions prescribed have a direct relationship to the suitable maintenance of transportation service, their imposition is clearly within the commerce power of Congress. And no viola-

tion of due process is involved since, as we have shown, the conditions are clearly just and reasonable.

No constitutional objection could be raised even should this Court hold that the conditions do not directly promote the public interest in transportation service and come within the statutory authority of the Commission only because of its power to impose "just and reasonable" conditions. The purpose of the conditions, as we have pointed out, is to assure that an interstate transaction, authorized by the Commission, will be effectuated on fair and equitable terms to all concerned. Clearly it is within the competence of Congress to prescribe a rule that will prevent an interstate transaction, admittedly subject to federal control, from working harm to those immediately affected by its consummation. Cf. *Mulford* v. *Smith*, 307 U. S. 38, 48. As this Court stated in the *Second Employers' Liability Cases*, 223 U. S. 1, 47,

> To regulate in the sense intended is to foster, protect, control, and restrain, *with appropriate regard for the welfare of those who are immediately concerned* and of the public at large.

The conditions here imposed come well within the broad limits of this rule.

It is true that in *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, this Court, by a narrow majority, held that a compulsory pension system for railroad employees was not within the commerce power of Congress. The decision of the

majority of the Court, however, was necessarily predicated upon the finding that the pension system there involved was not related to the suitable maintenance of transportation service. Here, on the other hand, as we have pointed out, such a relationship does in fact exist and the case therefore falls within the facts of the *Alton* case as viewed in the dissenting opinion of the Chief Justice rather than as viewed in the majority opinion of the Court.

II

EVEN IF THE CONDITIONS ARE INVALID, THE COURT BELOW ERRED IN ENJOINING THEIR ENFORCEMENT AND LEAVING THE REMAINDER OF THE AUTHORIZATION OUTSTANDING. THE PROPER RELIEF WOULD HAVE BEEN TO SET ASIDE THE ENTIRE AUTHORIZATION AND REMAND THE WHOLE PROCEEDING TO THE COMMISSION

The theory upon which appellees sought review of the Commission's action was that the District Court had the power to strike down the conditions upon which the authorization was granted and leave the authorization outstanding and valid. The United States and the Commission, by their several answers to the bill of complaint, raised the issue of the court's authority to grant such relief (R. 27, 30). The matter was fully argued at the hearing and the court apparently concluded that, since it had jurisdiction under the Urgent Deficiencies Act to enjoin, annul, set aside, or suspend, in whole or in part, any order of the Commission, it had power to grant the relief prayed (R. 42–43). Consequently, upon finding that the conditions imposed were invalid, the court entered a decree setting

aside the conditions and enjoining appellants from attempting to enforce them (R. 43–44). Although the decree expressly leaves open the question of the validity of the order without the conditions, the obvious intention of the court below was to allow appellees to consummate the lease without complying with the conditions and without securing further authorization from the Commission. Since the conditions are attached to a *permissive* order, the only purpose which the injunction against enforcement of the conditions can possibly serve is to allow appellees to avail themselves of the permission without complying with conditions.

We think that the court below erred in confusing the question of its jurisdiction under the Urgent Deficiencies Act with the question of what relief should be granted. We do not contend that the court had no power to entertain the suit; our contention is rather that it erred in the type of relief which it granted, *i. e.*, in entering a decree which purports to leave outstanding and valid an authorization which was not granted by the Commission and which is no longer supported by the requisite statutory findings of the Commission. In our view, the court should have remanded the whole proceeding to the Commission for the performance of the administrative function in a manner not inconsistent with the judgment of the court as to the validity of the conditions.

By section 5 (4) (b) of the Act the Commission, as a condition precedent to granting any authori-

zation, must find that "subject to such terms and conditions * * * as it shall find to be just and reasonable" the proposal "will promote the public interest." The statute is unequivocal—unless such a finding is made *by the Commission*, no consolidation or lease can be authorized or effected.

In the present case the Commission stated its ultimate finding in the following terms (R. 23):

> Accordingly, we find that, subject to the conditions prescribed in the previous report herein dated October 29, 1938, the proposed lease by Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, trustees in reorganization proceedings of The Chicago, Rock Island and Pacific Railway Company, of the properties of The Chicago, Rock Island and Gulf Railway Company, of which they are also trustees in reorganization proceedings, upon the terms and conditions proposed, will be in harmony with and in furtherance of our plan for the consolidation of railroad properties, and will promote the public interest, and we will enter an appropriate order, effective 40 days from its date.

It is entirely clear from this language that the conditions prescribed are an inextricable part of the finding which the statute required the Commission to make before it could approve the lease. The Commission has made no finding with respect to the lease shorn of the conditions and, until it does make such a finding, it has no authority under the statute to approve the lease. The rule is set-

tled that in the absence of basic findings, no order of an administrative tribunal can be sustained. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 431–433; *Florida* v. *United States*, 282 U. S. 194, 215; *Mahler* v. *Eby*, 264 U. S. 32, 43–45; *Wichita R. R.* v. *Public Utilities Commission*, 260 U. S. 48, 59. See also dissenting opinion in *United States* v. *Chicago, etc., R. Co.*, 282 U. S. 311, 342–344. In violation of this rule, the decision below leaves in effect an order which the Commission not only did not enter but which, in the absence of the statutory finding, it was without authority to enter.

Appellees may contend, and the court below apparently believed, that the evidentiary recitations in the Commission's report so clearly indicate the conclusion which the Commission would reach that it was unnecessary to remand the case to the Commission for further action. There are two fundamental objections to this position: *first*, it is impossible to predict with certainty what ultimate conclusion the Commission would in fact reach upon a reconsideration of the case within the limits of its authority as defined by the court below; and *second*, the courts have no power to substitute their judgment for that of the Commission, to supply necessary findings which the Commission has omitted to make or to rewrite the Commission's findings so as substantially to change their character. This second proposition is true no matter how plain the facts or how overwhelming the weight of the evidence.

In *Wichita R. R.* v. *Public Utilities Commission*, 260 U. S. 48, this Court said (p. 59):

> *When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective.*
>
> It is pressed on us that the lack of an express finding may be supplied by implication and by reference to the averments of the petition invoking the action of the Commission. We can not agree to this. It is doubtful whether the facts averred in the petition were sufficient to justify a finding that the contract rates were unreasonably low; but we do not find it necessary to answer this question. *We rest our decision on the principle that an express finding of unreasonableness by the Commission was indispensable under the statutes of the State.* [Italics supplied.]

Again in *Florida* v. *United States*, 282 U. S. 194, this Court pointed out (p. 215):

> The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this Court has recently adverted (*The Beaumont, Sour Lake & Western Railway Company* v. *United States, ante*, p. 74), but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the

evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported.

If this Court concludes that the Commission acted on erroneous principles of law and consequently that the findings which it made cannot be sustained, the way is open to remedy the situation and protect all parties by remanding the case to the Commission. The court's decision will then "be a final and indisputable basis of action as between the Commission and the defendant [appellees]." *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 38; see *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 143. But until, upon remand, the Commission does make the requisite statutory finding with respect to the lease without the conditions, the appellees have no authority to consummate the transaction.

Not only did the court below err in leaving in effect an order not supported by the requisite statutory finding, but it also erred in leaving in effect an order which the Commission never made and which is substantially different in character from the order which the Commission did make. The change in the order was not made by the Commission but by the court below, which has assumed the power to rewrite and revise the provisions of the order. In so doing, the court has attempted to

exercise an administrative function delegated by Congress to an administrative tribunal. It is fundamental that the courts do not have this power. *Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266; *Piedmont & Northern Ry.* v. *United States*, 280 U. S. 469; *United States* v. *Louisville & Nashville R. R.*, 235 U. S. 314; *Procter & Gamble* v. *United States*, 225 U. S. 282; *cf. Rochester Telephone Corporation* v. *United States*, 307 U. S. 125. In *United States, ex rel. Chicago etc. R. R. Co.* v. *Interstate Commerce Commission*, 294 U. S. 50, this Court said (p. 60):

> Where judgment or discretion is reposed in an administrative agency and has by that agency been exercised, courts are powerless by the use of the writ [of mandamus] to compel a different conclusion. *Interstate Commerce Comm'n* v. *United States ex rel. Waste Merchants Ass'n*, 260 U. S. 32; *Interstate Commerce Comm'n* v. *United States*, 289 U. S. 385, 394. Compare *Wilbur* v. *United States*, 281 U. S. 206, 218.

In *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464, 469, it was said that the courts cannot "exercise or participate in the exercise of functions which are essentially legislative or administrative."

If the action of the court below is to be construed as granting appellees permission to carry out the proposed plan in a manner different from that authorized by the Commission, the court has usurped

the administrative function vested by Congress solely in the Commission. It is immaterial that the Commission may have invalidly prescribed the terms and conditions which it imposed upon the plan. The fact remains that the sole tribunal empowered to grant the necessary authority has granted it only subject to such terms and conditions.

Arguments may be advanced as to the separability of the conditions from the remainder of the Commission's order. That raises the question of what the Commission intended and the Commission, which is a party to this suit, denies that it intended the conditions to be separable. As a matter of fact, it is perfectly clear from the reports that when the Commission granted authority it did so with intent to authorize nothing except the entire scheme encompassed by its order. What it might have done if it had known that part of the scheme could not be enforced remains in the realm of speculation.

In this respect, the statement of this Court in *United States* v. *Louisville & Nashville R. R.*, 235 U. S. 314, is peculiarly pertinent (p. 320):

> In view of the doctrine announced in *Interstate Com. Com.* v. *Illinois Cent. R. R.*, 215 U. S. 452; *Interstate Com. Com.* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235; *Interstate Com. Com.* v. *Louisville & Nashville R. R.*, 227 U. S. 88, it plainly results that the court below, in substituting its judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a

right to do so, obviously exerted an authority not conferred upon it by the statute.

Appellees will no doubt urge that the arguments advanced above are answered by the opinion of this Court in *United States* v. *Chicago, etc., R. Co.*, 282 U. S. 311. We do not regard that decision as necessarily conflicting with our position in the case at bar. In the first place, the majority of the court dealt only with the question of the lower court's jurisdiction to entertain the suit and did not discuss the question of what relief should be granted. In the present case we are not urging that the court below lacked jurisdiction of the suit, but rather that it granted relief which it had no power to grant. In the second place, analysis of the majority opinion indicates that it is based primarily on the view that the subject matter of the condition had no relation whatever to the subject matter of the proposal for which authority was sought and that the Commission had dealt with the condition "as an independent and separate matter" (p. 330). Consequently, the majority regarded the condition as being a separable and collateral part of the order which was not germane to the remaining parts. On the other hand, the minority of the court were of the opinion that the entire order was a unity and that the Commission intended it to be considered as such. Here there is no question but that the subject matter of the conditions is intimately related to the subject matter of the lease and that the conditions are an inextricable part of the scheme which the Commission authorized. That was the Commis-

sion's understanding, and the Commission in authorizing the scheme intended the conditions to be inseparable. To rule that the conditions may be separated is to disregard the intent of the Commission as shown by the record and as stated in court. The Commission's announcement of its own state of mind should be conclusive.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. 343

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION,
Appellants,

vs.

FRANK O. LOWDEN, JAMES E. GORMAN, AND JOSEPH B. FLEMING, AS TRUSTEES, ETC.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF FOR FRANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, AS TRUSTEES, ETC.

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INDEX.

	PAGE
Jurisdiction	1
Questions Presented	1
Statement	2
Summary of Argument	3
Argument:	
APPELLEE'S AFFIRMATIVE CASE IN SUPPORT OF THE DECREE BELOW.	
I. Conditions imposed by the Commission are void because they are unrelated to the standards established by the statute, and hence are beyond the Commission's power	9
1. Sec. 5(4)(b) prescribes two standards: the proposed lease (1) will be in harmony with the Commission's general consolidation plan and (2) will promote public interest	9
2. Carrier's employes, as such, are not a part of the public; their interest in preserving their jobs is private	17
3. The Commission's power to prescribe just and reasonable terms is not an independent standard, nor a power to alter the standard specifically prescribed by the statute	18
4. By separate and distinct legislation, Congress has provided for payments to carrier employes who lose their positions	20
II. The order, sans conditions, is complete and self-sustaining and rests upon adequate findings upon every subject matter pertaining to public interest. The conditions are therefore severable	22

III. If Sec. 5(4) be construed as giving power to the Commission to impose the conditions here, the statute would be unconstitutional..... 25

1. The subject matter of the conditions lies outside the realm of Interstate Commerce and the money payments required by the conditions does not represent a regulation of Interstate Commerce under the constitutional grant 25

2. Compulsory payment of money to persons who are nonemployes and who render no service in return takes appellees' property without due process of law..... 28

Reply to Appellants' Argument 29

Citations.

Cases:

Cawker v. Meyer (Wis.), 133 N. W. 157..... 16

Central N. S. Ry. Co. v. B & A. R. Co., 279 U. S. 415 31

Consolidation of Railroads, 159 I. C. C. 522..... 9

Monongahela Navigation Co. v. United States, 148 U. S. 312 28

Mulford v. Smith, 307 U. S. 38..... 34

New York Central Securities Co. v. U. S., 287 U. S. 12 .....9, 11, 29

Noble State Bank v. Haskell, 219 U. S. 104..... 28

Radio Com. v. Nelson Bros. Co., 289 U. S. 266... 14

Railroad Retirement Board v. Alton R. Co., et al., 295 U. S. 330 .....26, 28, 34

Rochester Telephone Co. v. U. S., et al., 59 Sup. Ct. Rep. 754 31

Schechter Corp. v. United States, 295 U. S. 495.. .....10, 13, 29
Terminal Taxicab Co. v. Kutz, et al., 241 U. S. 252 .....17, 31
Texas, et al. v. United States, 292 U. S. 522....12, 29
Union Bridge Co. v. United States, 204 U. S. 364. 18
United States v. C. M. St. P. & P. R. Co., 282 U. S. 311 .....23, 25, 35, 36, 37
United States v. Maher, 59 Sup. Ct. 768..... 31
West v. P. B. & W. R. Co. (Md.), 141 Atl. 509..14, 31
Wilson v. New, et al., 243 U. S. 332..... 28

aws:

Interstate Commerce Act, Sec. 5(4)..... .....3, 4, 6, 9, 11, 18, 19, 20, 25, 31
Fifth Amendment 28, 34, 35
Radio Act of 1927 14
Railroad Unemployment Insurance Act of July 1, 1939 21
Social Security Act (Title IX) 21
United States Code, Title 28, Sec. 41..... 35
Urgent Deficiencies Act, 38 Stat. at Large 220... 35

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JURISDICTION

Appellees agree that this Court has jurisdiction of the appeal in this case.

QUESTIONS PRESENTED

Appellees agree that the questions presented are as stated by appellants.

Question II is not well worded. A more accurate statement is

> "Whether * * * the District Court had power to annul and enjoin that part of the Commission's order containing the conditions prescribed and leave outstanding that part of the order, authorizing the lease, without the conditions."

STATEMENT

Appellants' statement of the case is accepted.

SUMMARY OF ARGUMENT

I

The Interstate Commerce Act is a code of laws regulating the activities of railroads as *common carriers.* That term denotes a business "affected with a public interest." The word *public* refers to the persons who use the carriers' services; their *interest* is in the quantity, quality and cost to them of those services.

Such are the meaning and scope of the term "public interest" in Sec. 5 (4). The prescriptions of the entire Act are directed to the rights of common carriers and performance of their duties to the travelling and shipping public. Sec. 5 (4) authorizes approval of a lease of carrier property if the Commission finds that it will promote the public interest. This authority has direct relation to the standards prescribed for the service of common carriers, and, as shown by the context and purpose of the Act, is to be exercised in order to insure adequacy of transportation service, economy and efficiency, and best use of transportation facilities.

The carrier's employes, as such, are not a part of the public referred to in Sec. 5 (4), nor is their interest in securing or holding employment with the carrier a public interest. It is a private interest only, and therefore is not within the "public interest" to which Sec. 5 (4) refers. Congress has undoubted power to legislate on the subject of carrier employer-employe relationship; an example is the Railway Labor Act. But Sec. 5 (4) does not represent an exercise of that power; there Congress is dealing with an entirely different subject-matter, as shown by the terms used in, and the context and purpose of, the Act.

The conditions imposed by the Commission in this case are solely in the interest of the employes who will lose their positions as a result of unified operation under the lease. The continuance of their employment, or protection against hardship in losing their employment, is not a matter of interest to the travelling and shipping public, because these matters do not affect transportation conditions or the performance of common carrier activities. Hence, the imposition of the conditions was without the Commission's authority.

Appellants refer to the Commission's power to prescribe "terms and conditions as it finds to be just and reasonable," as a source of authority for the conditions. That power does not have the status of a standard for the guidance of the Commission; it lacks the qualifications of a standard incident to delegation of legislative power because it is indefinite and points to no end to be attained. Its function is merely to enable the Commission to alter a proposed lease, otherwise defective in complying with the standards of the Act, in such manner that it will conform.

That Sec. 5 (4) of the Act does not include the subject-matter of the conditions is further manifested by the fact that Congress has provided for payments to carrier employes who, without fault, become unemployed, by means of separate statutes dealing with the specific subject. To hold that Sec. 5 (4) authorizes the payment sought to be compelled by these conditions, is to place the carrier employer under the burden of a double payment—a burden not imposed upon any other employer. There is no reason which indicates that Congress had any such intention.

II

The order, exclusive of the conditions, is complete and self-sustaining. The Commission has found favorably upon every element which is properly embraced by the term "public interest." Those elements are by their very nature independent of and unrelated to the money payments required by the conditions, and the performance or non-performance of those conditions will not alter or qualify the force of the facts of record on which those particular findings are based. Removal of the conditions, therefore, leaves the promotion of the public interest unimpaired. To annul the conditions and leave the remaining part of the order in effect, does not have the effect of substituting the judgment of the court for the administrative judgment of the Commission. The Commission's judgment has already been exercised upon every factor within the domain of public interest. It cannot be heard to say that it might have arrived at a different judgment, or that a different administrative question would have been presented, if it had been advised that the conditions were beyond its powers. Those conditions embrace a different and independent subject; the omission of that subject from the deliberations of the Commission could not have altered the conclusions compelled by the facts of record relating to transportation conditions and cognate matters.

III

The payment of money to persons who are no longer employes and who render no service or give anything of value in return, is not a regulation of interstate commerce within the constitutional grant to Congress. The obligation of the conditions begins only when the payee's engagement in interstate commerce ends. At that time, the

ex-employe's disassociation from interstate commerce is as complete as before his employment began.

The claim that payments to ex-employes promote the welfare and morale of employes still in service by insuring that the latter may look forward to receipt of similar payments in the event their employment should cease because of lease, consolidation etc., is purely fanciful. The connection is too remote and speculative.

The conditions have the effect of depriving appellees of due process of law by taking their property and bestowing it as a gratuity upon others. Even if it could be conceived that such payments sufficiently touch and pertain to interstate commerce that their compulsion is a proper regulation thereof, the lack of due process of law remains. This Court has consistently maintained that the power to regulate commerce must be exercised in conformity with the requirements of the Fifth Amendment.

These constitutional objections do not arise if Sec. 5 (4) be construed not to extend to the subject-matter of the conditions.

Reply to Appellants' Argument

It is a mistaken assumption that the language of Sec. 5 (4), which gives the Commission power to impose such conditions as it shall find to be just and reasonable, constitute a standard to guide determination. They lack the necessary attributes of a standard that must accompany a delegation of legislative power. A standard measures what must be attained. "Terms and conditions" import no standard; they measure nothing, either alone or qualified by "just and reasonable.". They imply nothing regarding the subject-matter to be covered thereby; they point to no result that must be accomplished.

The power to impose conditions is merely a means whereby the Commission may cause that end to be attained in instances where the carrier's proposals fail to do so.

In their endeavor to make the statute comprehend employe interests in a lease arrangement, counsel expand the statute so as to take in "all parties involved and directly affected." This expansion not only is unjustified; it is insufficient for the purpose intended because the employe interest is not of such nature as to bring them within the designation stated.

Appellants' efforts to demonstrate that the conditions are "just and reasonable" is labor wasted. The petition does not raise that issue.

The subject of statutory protection to employes who lose their positions through consolidations, mergers, leases, etc., has engaged the attention of the Commission, of various public officials and of Congress itself, all to the end of procuring appropriate legislation. The number and extent of these efforts indicate widespread belief that no statutory provision in that behalf now exists. Counsel's explanation that the sought-for legislation is merely to "remove doubt" is not impressive.

Replying to the argument that the conditions *are* in the public interest: The Commission's finding that they are so does not support the proposition when that finding is the very matter under attack. Nor are statutes such as Hours of Service, Safety Appliance Act, the Railway Labor Act, etc., evidence in that behalf. These statutes concern actual railroad operation and affect employes while in the service, not after they leave it.

The just and reasonable character of the conditions does not permit them to escape operation of the Fifth Amendment. Appellants do not explain how this could result.

There is nothing in the statutes or the decisions of the Court which suggest that a remand to the Commission is necessary or proper. A remand in this case would serve no useful purpose. The Commission has made all of the basic findings necessary to support the valid part of the order; the subject-matter of the conditions is so unrelated to the valid part that the latter, and the facts of record which support it, cannot be affected by the elimination of the void portion. Upon remand, the legally relevant facts of record would compel the same conclusion as respects promotion of public interest, as the Commission has already made. The Commission's judgment, whether in the first instance or upon remand, must rest upon only those facts which it is empowered to consider; and it may not withhold its approval where the facts warrant because it would like to, but may not, consider a wholly different set of facts—in this case, the employes' interests.

Where conditions are severable, in accordance with established principles which determine severability, the "intent" of the Commission that they be inseparable cannot prevail.

ARGUMENT

APPELLEES' AFFIRMATIVE CASE IN SUPPORT OF THE DECREE BELOW

I

THE CONDITIONS IMPOSED BY THE COMMISSION ARE VOID BECAUSE THEY ARE UNRELATED TO THE STANDARDS ESTABLISHED BY THE STATUTE, AND HENCE ARE BEYOND THE COMMISSION'S POWER.

1. *Section 5(4)(b) Prescribes Two Standards to Guide the Commission's Determination; i. e., That the Proposed Lease (1) Will Be in Harmony With and in Furtherance of the Commission's General Consolidation of Railroads Plan, and (2) Will Promote the Public Interest.*

The Commission specifically found that the proposed lease complies with standard No. 1. "In *Consolidation of Railroads,* 159 I. C. C. 522, we assigned the properties of both carriers to System No. 19, Rock Island-Frisco." (R. 20.)

With respect to standard No. 2, this Court has held that the words "will promote the public interest" constitute an adequate standard to guide the Commission's determinations. *New York Central Securities Co.* v. *U. S.*, 287 U. S. 12, 24.

The Commission purported to find its authority to impose the conditions in question in the statutory term "public interest" which, it says, is broad enough to comprehend the interest of railway employees in changes in management, ownership or operations of the company by which they are employed. Appellees contend that this construction is untenable, being contrary alike to reason and to authority.

The words "public interest," standing alone, comprehend so wide a range of possible subjects as to be without value. Here, we are concerned with their meaning, determined from the text of the statute in which they stand, the "Interstate Commerce Act". That entire Act relates to a single subject—the rights and duties of common carriers of passengers and property. This Court has described that Act as

> "a code of laws regulating the activities of the common carriers subject to the Act, in order to assure the performance of their services upon just and reasonable terms, with adequate facilities and without unjust discrimination." *Schechter Corp.* v. *U. S.*, 295 U. S. 495, 539.

"Common carrier", by ancient usage and understanding, is a term descriptive of the public character of the service, *i. e.*, the duty to serve any and every one on demand. Another conventional expression is that a common carrier is one whose business is "affected with public interest." Still another established expression is that a common carrier is one who holds himself out to the public to carry freight or passengers for hire. The *public* that is thus referred to means those persons who make use of the services and facilities of the common carrier. Hence, the public which is referred to in "a code of laws regulating the activities of common carriers" has reference to the people in whose interest such activities are regulated, those who ship goods or who travel as passengers in interstate commerce. Citizens who travel on the highway may have an interest in the police-power regulation which requires the railroad engineer to sound the whistle at highway crossings; citizens who sell materials and supplies to the railroad have an interest in the company as a customer; citizens who own its securities are interested in its prosperity. But these citizens, even if sufficiently numerous to

warrant designation as "public" are not those whose interests as highway travelers, merchants or stockholders are subserved by the Interstate Commerce Act. That Act deals with only *one interest* of the public, *i. e.*, transportation; and the Act is designed, in all the different aspects of its subject-matter, to secure the public's transportation needs, adequate in quantity and quality and at rates which are neither excessive nor discriminatory. The "public interest" which Section 5(4) requires to be promoted, is precisely the same as that dealt with by the entire scheme of regulation contained in the Act.

Such is the interpretation adopted by this Court. In *New York Central Securities Co.* v. *U. S.*, 287 U. S. 12, a minority stockholder sought to set aside the Commission's order approving the lease by the New York Central R. Co. of certain other railroad systems. With respect to the statutory criterion of "public interest", the Court said, (p. 24):

> "It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary. Going forward from a policy mainly directed to the prevention of abuses, particularly those arising from excessive or discriminatory rates, Transportation Act, 1920, was designed better to assure adequacy in transportation service. This Court, in *New England Divisions Case*, 261 U. S. 184, 189, 190, adverted to that purpose, which was found to be expressed in unequivocal language; 'to attain it, new rights, new obligations, new machinery, were created.' The Court directed attention to various provisions having this effect, and to the criteria which the statute had established in referring to 'the transportation needs

of the public,' 'the necessity of enlarging transportation facilities,' and the measures which would 'best promote the service in the interest of the public and the commerce of the people.' Id. p. 189, *note*. See, also, *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266, 277. The provisions now before us were among the additions made by Transportation Act, 1920, and the term 'public interest' as thus used is not a concept without ascertainable criteria, *but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities*, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred."

In *Texas, et al.* v. *United States*, 292 U. S. 522, another case involving a railroad lease approved by the Commission's order, the Court said:

"These broadening provisions of the Emergency Railroad Transportation Act, 1933, confirm and carry forward the purpose which led to the enactment of Transportation Act, 1920. (Title IV, 41 Stat. 474, *et seq.*) We found that Transportation Act, 1920, introduced into the federal legislation a new railroad policy, seeking to insure an adequate transportation service. To attain that end, new rights, new obligations, new machinery, were created. *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 585; *New England Divisions Case*, 261 U. S. 184, 189, 190; *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, 478. It is a primary aim of that policy to secure the avoidance of waste. That avoidance, as well as the maintenance of service, is viewed as a direct concern of the public. *Davis* v.

Farmers Co-Operative Co., 262 U. S. 312, 317; *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, 277. The authority given to the Commission to authorize consolidations, purchases, leases, operating contracts, and acquisition of control, was given in aid of that policy. *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24, 25. The criterion to be applied by the Commission in the exercise of its authority to approve such transactions—a criterion reaffirmed by the amendments of Emergency Railroad Transportation Act, 1933—is that of the controlling public interest. And that term as used in the statute is not a mere general reference to public welfare, but, as shown by the context and purpose of the Act, 'has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities.' *New York Central Securities Corp* v. *United States, supra.*"

In *Schechter Corp.* v. *U. S.*, 295 U. S. 495, the Court had occasion to refer to the powers of the Interstate Commerce Commission:

"When the Commission is authorized to issue, for the construction, extension or abandonment of lines, a certificate of 'public convenience and necessity,' or to permit the acquisition by one carrier of the control of another, if that is found to be 'in the public interest,' we have pointed out that these provisions are not left without standards to guide determination. The authority conferred has direct relation to the standards prescribed for *the service of common carriers* and can be exercised only upon findings, based upon evidence, with respect to particular *conditions of transportation.*" (p. 540).

The words "public interest" are also found in the Radio Act of 1927, which creates a Federal Radio Commission and confers upon it various powers, one of which is the granting of licenses to private radio stations. In *Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, which involved the validity of an order of the Commission that granted a license to one station and terminated existing licenses held by appellee's stations, the Court said (p. 285):

> "In granting licenses the Commission is required to act 'as public convenience, *interest* or necessity requires.' This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. The requirement is to be *interpreted by its context*, by the *nature of radio transmission and reception, by the scope, character and quality of services*, and, where an equitable adjustment between States is in view, by the relative *advantages in service* which will be *enjoyed by the public* through the distribution of facilities."

In other words, the public whose interest the Radio Act is intended to conserve is the *public which makes use of the services* of radio transmission and reception.

The decisions of State courts accord with the foregoing. One of these, involving substantially identical principles, is *West* v. *P. B. & W. R. Co.* (Md.), 141 Atl. 509. The railroad, desiring to eliminate curves and improve grades, applied to the Public Service Commission of Maryland for approval. Objection was made to that feature of the plan which required an embankment 20 feet high at Port Deposit, whose presence would injure adjacent property by obstructing view, lessening light and air, etc. The Commission attached to its order a proviso fixing the minimum grade for the new line which would require a

less high embankment. On appeal, the Railroad Company contested the Commission's power to make the proviso; the conflict in views resulted from the different interpretations which the parties gave to the word "public," as used in the statute defining the powers of the Commission.

> "As the appellants construe it, it authorizes the commission, in dealing with an application such as that made in this case, to consider the effect of the proposed plan upon private property adjacent to the relocated railroad, and to weigh and balance any damage which it may cause to that property against any advantage which it will give the railroad company, and to grant it or refuse it as the one or the other preponderates. The appellees, however, contend that the only interest which the commission can consider is the interest which the whole public has in the maintenance of an efficient transportation system furnishing to the public adequate facilities, at reasonable rates. Both of these views have been forcibly and ably presented in this court, but in our opinion the question is free from any real difficulty."

After quoting from the statutes, the court continued (p. 515):

> "These quotations fairly reflect the purpose and scope of the entire statute, and it is manifest from an examination of it, as well as of them, that the *public interest* which is committed to the protection of the commission is the interest which the public has in the operation of the railroads in such a manner as to furnish efficient service at reasonable rates, and that the power of the commission over railroad companies lies within those limits. That is to say it has no power to interfere with any act or policy of the corporation which will not in some manner adversely affect the public interest in its service or rates. There

is nothing in the acts to support the theory that its purpose was to substitute the commission for the directors and officers of the corporation in the management and operation of the railroad, but every presumption is to the contrary."

And again (p. 516):

"But the 'public' referred to in that section obviously means the whole public, and not a particular part of it owning property contiguous to the railroad, and it is not apparent how the interest of the whole public would be served by requiring a railroad to be constructed at a grade which would make transportation over it more expensive and less efficient."

In *Cawker* v. *Meyer*, (Wis.) 133 N. W. 157, the action was brought to restrain the Railroad Commission of Wisconsin from enforcing certain provisions of the public utility law against plaintiffs. The Commission contended that plaintiffs were operating a public utility by furnishing heat, light and power to tenants of their own building. Plaintiffs contended that this was not a public use of their plant. The Court said (p. 159):

"It is very difficult, if not impossible, to frame a definition for the word 'public' that is simpler or clearer than the word itself. The Century Dictionary defines it as: 'Of or belonging *to the people at large*; relating to or affecting the whole people of a state, nation or community; *not limited or restricted to any particular class* of the community.' The New International defines it as: 'Of or pertaining to the people; relating to or affecting a nation, state or community at large.' The tenants of a landlord are not the public; neither are a few of his neighbors, or a few isolated individuals with whom he may choose to deal, though they are a part of the public. The word 'pub-

lic' must be construed to mean more than a limited class defined by the relation of landlord and tenant, or by nearness of location, as neighbors, or more than a few who, by reason of any peculiar relation to the owner of the plant, can be served by him."

2. *A Carrier's Employees, as Such, Are Not a Part of the Public, and Their Interest in Preserving Their Jobs Is Not Such Interest as the Statute Had in Mind. Their Interest Is a Private as Distinguished from a Public Interest.*

The foregoing cases make it apparent that the word "public" as used in statutes regulating the rights and duties of public service corporations, has reference to those persons who actually or potentially *deal with such corporations in respect of their public calling.* It may be, as remarked by Mr. Justice Holmes,

> "No carrier serves all the public. His customers are limited by place, requirements, ability to pay, and other facts."
>
> *Terminal Taxicab Co.* v. *Kutz, et al.*, 241 U. S. 252.

But it is those customers which constitute the public to which the regulatory statute refers.

The business of serving taxicab patrons at railway stations, hotels, etc., was held to be of public character. But that part consisting of livery service (furnishing automobiles from its central garage on orders) was held to be private business. As to this latter, Mr. Justice Holmes said:

> "It is true that all business, and, for the matter of that, every life in all its details, has a public aspect, some bearing upon the welfare of the community in which it is passed."

If "public interest" were so used in Section 5(4), it would be too general and ambiguous to serve as a prescribed standard for the delegation of legislative power under the principle in *Union Bridge Co.* v. *United States*, 204 U. S. 364, 384-385.

Public interest, then, is the correlative of public duty; the ambit of one marks that of the other. But while every member of the public has the right to call upon the utility for its services, no one has the right to require the utility to enter into a private arrangement with him. A contract of employment is certainly a private arrangement; if a person is employed, it is as a private individual and not as a member of the public. The contract of employment is one which neither party is bound to make. To say, as the Commission does in its report, that employes have an interest in the management, ownership or operation of the companies by which they are employed, is true; it is equally true that a creditor of the company has an interest in such management, ownership or operation of his debtor company. But it is obviously untrue that the employe's interest is a public interest. As employes, they are not the public. It is a complete misuse of the term, in every conception which it involves, to call them so.

3. *The Commission's Power to Prescribe "Such Terms and Condition, and Such Modifications as it Shall Find to be Just and Reasonable" Is Neither an Independent Standard nor a Power to Alter or Add to the Two Standards Specifically Prescribed by Section 5(4). Its Purpose Is Merely to Enable the Commission to Apply a Corrective to a Proposed Lease and Thereby Make It Conform to the Standards of the Act.*

Section 5(4), sub-division (b), provides:

"If after such hearing, the Commission finds that, *subject to such terms and conditions and such modifi-*

cations as it shall find to be just and reasonable, the proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and will promote the public interest, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon the terms and conditions and with the modifications so found to be just and reasonable."

The expression "terms and conditions" cannot be an independent category of standard. These are general words and in themselves indicate no particular subject-matter, nor does the qualification "just and reasonable" make them otherwise in this respect. Being indefinite, they are too uncertain to serve as a prescribed standard in connection with delegation of legislative power; they point to no result which the Commission must bring about. This would seem too clear for mention except that appellants (Brief, p. 14, 16, *et seq.*,) treat the Commission's power to fix terms and conditions as one which is independent of, and additional to the statutory requirements of harmony with the general consolidation of railways plan and the promotion of public interest. The only limitation* which appellants acknowledge is that the conditions must be "germane to the transaction." Appellants regard the "transaction" as embracing "all parties affected thereby" (Brief, p. 14), or, "parties or groups whose interests are directly affected by an acquisition of control" (Brief, p. 23). That is to say, the transaction may be "germane" to employes, to merchants from whom the lessor has been accustomed to buy its materials and supplies, to merchants at points from which the lessee may transfer

* For brevity in discussion, we omit mention of the qualification "just and reasonable", which is, of course, understood to exist.

employes, to taxing districts from which the lessee may move shops or terminals, to minority stockholders, etc., all of whom are in a position to be "directly affected." Passing by the controverted question regarding employes, where is there any standard to guide the Commission's determination with respect to the others mentioned? *What* terms and *what* conditions may the Commission impose with respect to their interest in the transaction? The words themselves afford no clue, and there is no enlightening text. Interpreted as a distinct standard, a power to impose "terms and conditions" would be the Achilles heel of the statute.

The power to fix terms and conditions and to make modifications is given to the Commission in order that instead of denying an application for failure to conform to the prescribed standards, it may alter the proposed lease so as to make it conform. But whether the provisions and incidents of a lease originate with the applicants, or represent modifications and changes made by the Commission, the lease finally authorized must conform to the prescribed standards of the statute. In other words, the Commission can do only what was open to the applicant carriers to do in the first instance.

4. *By Separate and Distinct Legislation, Congress Has Provided for Payments to Carrier Employes Who, Without Fault, Lose Their Positions From Any Cause.*

To construe Sec. 5(4) as authorizing the Commission to impose the conditions in question is to hold that (1) Congress has dealt with the same subject twice by means of separate statutes, each creating its own separate and independent burden on the employer—and has done this only as respects *railroad* employers; and (2) the railroad employer is under a duplicate burden in respect of the ex-employes in this case.

Until July 1, 1939, railroad employers were subject to the Unemployment Tax provisions (Title IX) of the Social Security Act of August 14, 1935. On that date, their liability was transferred to the Railroad Unemployment Insurance Act. By these statutes Congress has specifically provided ways and means of mitigating the hardships of unemployment through loss of position; the railroad employer pays the tax to provide the necessary funds. Appellees have paid, and will continue to pay, such taxes. If the conditions in question are valid, appellees will have to pay additional sums for the identical purpose for which they have already paid in the form of taxes.

To conclude that Congress intended that the employe who loses his position from ordinary causes shall have but one benefit, but that the employe who loses his position as a result of unified operations under a lease shall have two benefits, makes Congress guilty of an absurdity —a guilt which can be arrived at, however, only by giving the Interstate Commerce Act a strained and unnatural construction; a construction, be it noted, inconsistent with the Commission's previous ideas on the subject. For, as Chairman Caskie said in his dissent (R. 25), the Commission recommended in its annual reports to Congress for 1935 and 1936, that it be given statuory authority to protect employes from undue financial loss arising from authorized railway unification but Congress, although it has amended the Interstate Commerce Act in other respects, has never changed Section 5(4) since the Commission has submitted that recommendation. Although its recommendation has been pending before Congress for 4 years, the Commission's jurisdiction has not been changed.

II

THE ORDER, SANS CONDITIONS, IS COMPLETE AND SELF-SUSTAINING AND RESTS UPON ADEQUATE FINDINGS UPON EVERY MATTER WHICH IS PROPERLY INCLUDED WITHIN "PUBLIC INTEREST". THE PUBLIC INTEREST FACTORS ARE UNAFFECTED BY THE ANNULMENT OF THE CONDITIONS. THE CONDITIONS ARE THEREFORE SEVERABLE AND THEIR ANNULMENT DOES NOT DESTROY THE INTEGRITY OF THE ORDER.

Giving the term "public interest" its proper meaning, as set forth under Point I, *supra*, it is apparent that the Commission's reports (of both Division 4 and the entire Commission) contain findings in favor of the public interest upon every aspect in which that interest is affected by the proposed lease. Division 4 found (R. 9-10):

> "Train operations are conducted irrespective of State boundary lines. The train operations limited to the State of Texas are said to be very few. No change in train operations is here involved. Operation by the Rock Island under the proposed lease will not impose upon the public any conditions pertaining to transportation of freight different from those now in effect, will result in no change in service to the public, and will have no effect upon rates or routes."

And again (R. 14),

> "It is clear from the record that the duplicate accounting now necessary under the present plan of operating the properties of the applicants requires excessive expenditures not in the public interest and which are a burden on interstate and foreign commerce."

These findings were affirmed by the entire Commission upon the reargument (R. 19).

With the quantity and quality of train service unimpaired, carrier service unchanged, rates and routes un-

affected, and economy promoted by elimination of excessive expenditures not in the public interest, it is impossible to conceive of any other matter in which the proposed lease can affect the interests of the public.

It is self-evident that none of these matters is dependent in the slightest degree on, or has any possible connection with, the subject-matter of the conditions. The frequency and speed-schedules of trains, the rates and routes, and the general transportation conditions under the lease operations will remain the same whether or not the persons whose employment is terminated are paid a dismissal wage. Non-payment will not diminish to the slightest extent the virtues of the lease. This result demonstrates that the order, resting upon grounds sufficient to support it, is complete and self-sustaining, and that the removal of the conditions does not impair it.

United States v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 282 U. S. 311, 331.

Appellants attempt to distinguish that case. They say (Brief, p. 47) that the majority opinion (1) dealt only with the question of the lower court's jurisdiction to entertain the suit and did not discuss the question of what relief should be granted; (2) is based primarily on the view that the subject-matter of the condition had no relation to the subject-matter of the proposal for which authority was sought, and therefore the condition was regarded as a separable and collateral part of the order.

The first attempted distinction is repelled by the opinion on its face; the concluding paragraph (p. 331) reads:

> "From the foregoing it results that the condition in respect of the special fund of $1.50 per share was properly set aside and its enforcement enjoined by the court below. *Decree affirmed.*"

The decree below enjoined the condition which required

the company to impound the $1.50 per share in a separate fund. This was the relief granted. There is not the slightest hint in the opinions, either of this Court or of the lower court, that the injunction impaired the validity of the remaining part of the Commission's order. That the lower court did not intend otherwise is shown by the statement (33 F. (2); at p. 589):

> "An otherwise valid order is not affected by the addition of an invalid condition."

If such order is not affected by the addition, it follows with equal logic that it is not affected by a subtraction of the invalid condition.

The second distinction fails because the difference to which it points does not exist. For in the instant case also, the subject-matter of the conditions has no relation whatever to the subject-matter of the proposed lease. Counsel assert (Brief, p. 47), that the subject-matter of the conditions and of the lease are "intimately related," but the argument ends with the mere statement. Lack of relationship is demonstrated by the fact that every conceivable objective of the lease is attainable, and every conceivable interest (as enumerated in the Commission's Reports) of the travelling and shipping public will be promoted, whether or not the ex-employes are paid dismissal wages.

III

IF SEC. 5 (4) OF THE ACT BE CONSTRUED AS GIVING POWER TO THE COMMISSION TO IMPOSE THE CONDITIONS HERE INVOLVED, THE STATUTE WOULD BE UNCONSTITUTIONAL.

1. The Subject-Matter of the Conditions Lies Outside the Realm of Interstate Commerce. The Payment of Money to Persons Who Are No Longer Employes and Who Render No Service During the Period to Which the Payments Relate, Is Not a Regulation of Interstate Commerce Within the Meaning of the Constitution.

In *U. S.* v. *Chicago, etc., R. Co.*, 282 U. S. 311, the Court said (p. 324):

> "The powers possessed by the commission are delegated by Congress under, and are to be exercised in conformity with, the constitutional grant of authority to regulate interstate and foreign commerce. Proceeding under that grant, as applied to the present matter, neither the commission nor Congress itself may take any action which lies outside the realm of interstate commerce. *Hammer* v. *Dagenhart*, 247 U. S. 251. It follows that if the condition in question relates not to such commerce, or to the rights or duties of the carrier engaged in such commerce, but exclusively to extrinsic matters, it is imposed without authority of law."

The payment of money to ex-employes certainly has no relation to interstate commerce or to the rights or duties of the carrier engaged in such commerce; such payment is exclusively an extrinsic matter. During the period of employment, the employe may be, and in most cases is, engaged in interstate commerce. He is part of the ways and means by which such commerce is carried on by the employer. But after he has left the service, he has no more connection with interstate commerce, than has a bank clerk,

a garage mechanic, or a street sweeper. Under the prescribed conditions, the obligation to pay the dismissal allowance begins when the recipient's engagement in interstate commerce ends.

A direct authority on this point is *Railroad Retirement Board* v. *Alton R. Co., et al.*, 295 U. S. 330. This involved the validity of the Railroad Retirement Act of 1934, which required railroad carriers to pay moneys into a fund for the payment of annuities to retired railroad employes. Upon the interstate commerce aspect of the case, the court said (p. 362):

> "The Act is not, in purpose or effect, a regulation of interstate commerce within the meaning of the Constitution."

Whether the ex-employe left the service because of age retirement or because his work no longer had to be performed, is immaterial. Payment of money to the ex-employe, whether called a pension in the one case, or a dismissal wage in the other, has no reasonable relation to the business of interstate commerce; and this is equally true whether the payment be voluntary or enforced.

Appellants revive the old claim that payments to ex-employes are related to the maintenance of the welfare and morale of employes still in service (Brief, p. 35-36). Without disputing that such welfare and morale are desirable, we reply that the claim is utterly fanciful. It is the same assertion which this Court disposed of in *Railway Retirement Board* v. *Alton R. Co., et al.*, 295 U. S. 330:

> "The petitioners' explanation of this feature of the Act is • • • that such a provision is reasonable 'because it improves the morale of the employes while they are in service.' Assurance of security it truly gives, but, quite as truly, if 'morale' is intended to connote efficiency, loyalty and continuity of service, the surest way to destroy it in any privately owned

business is to substitute legislative largess for private bounty and thus transfer the drive for pensions to the halls of Congress and transmute loyalty to employer into gratitude to the legislature. (p. 351)

"In final analysis, the petitioners' sole reliance is the thesis that efficiency depends upon morale, and morale in turn upon assurance of security for the worker's old age. Thus pensions are sought to be related to efficiency of transportation, and brought within the commerce power. In supporting the Act the petitioners constantly recur to such phrases as 'old age security,' 'assurance of old age security,' 'improvement of employee morale and efficiency through providing definite assurance of old age security,' 'assurance of old age support,' 'mind at ease,' and 'fear of old age dependency.' These expressions are frequently connected with assertions that the removal of the fear of old age dependency will tend to create a better morale throughout the ranks of employes. The theory is that one who has an assurance against future dependency will do his work more cheerfully, and therefore more efficiently. The question at once presents itself whether the fostering of a contented mind on the part of an employee by legislation of this type, is in any just sense a regulation of interstate transportation. If that question be answered in the affirmative, obviously there is no limit to the field of so-called regulation. • • • We think the answer is plain. These matters obviously lie outside the orbit of Congressional power." (pp. 367-368)

2. *The Compulsory Payment of Money to Persons Who Are No Longer Employes and Who Render No Service Deprives Appellees of Due Process of Law by Taking Their Property and Bestowing It Upon Others.*

It is elementary that the plenary power of Congress to regulate interstate commerce is not absolute, and is subject to the limitations and guaranties of the Fifth Amendment to the Constitution. *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312. If Sec. 5(4) of the Act be construed as authorizing the imposition of the conditions in this case, it is unconstitutional. The ex-employes have been paid in full for services rendered prior to their dismissal. They give nothing in return for any so-called dismissal wages thereafter paid to them. Such compulsory payment finds no support in the power of Congress to regulate wages of railroad employes (*Wilson* v. *New, et al.,* 243 U. S. 332); there, the carrier still receives the employes' services in return. Nor can support be found in the principle announced in *Noble State Bank* v. *Haskell,* 219 U. S. 104, in which this Court upheld a statute which required State banks to contribute to a guaranty fund established to make good losses to the depositors of banks which might become insolvent. The benefit which each party received in this scheme of mutual protection was held to be sufficient compensation for the correlative burden which it was compelled to assume. In the present case, the burden is wholly one-sided, and the ex-employe gets all the benefit; in *Retirement Board* v. *Alton R. Co.,* 295 U. S. 230, the court held that the compulsory payment by the carriers into a fund to be disbursed to ex-employes was the taking of property or money of one and transferring it to another without compensation, and that this contravened the due process clause of the Fifth Amendment.

REPLY TO APPELLANTS' ARGUMENT

The Summary of Argument contains an inaccuracy of statement:

> "The District Court, in *ruling* that the conditions imposed by the Commission were not in the public interest," etc. (p. 13)

This language implies that the court found that the conditions were *against* public interest instead of *for* it, as the Commission believed, and therefore held them invalid. Actually, the ruling was that the conditions were invalid because they were *unrelated* to public interest.

Appellants evidently feel the compelling effect of this Court's interpretation of the term "public interest" as used in Sec. 5(4) (b), *i. e.*, that it "has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities."

> *New York Central Securities Corp.* v. *United States*, 287 U. S. 12.
>
> *Texas, et al.*, v. *United States*, 292 U. S. 522.
>
> *Schechter Corp.* v. *United States*, 295 U. S. 495, 540.

Being foreclosed from finding warrant for the conditions in the term "public interest", they seek a further source of authority and purport to find it in the language which gives the Commission power to impose such conditions as it shall find to be just and reasonable. (See Brief, p. 16, *et seq.*) They raise this power to the status of a standard, equal to and coordinate with the requirement of harmony with the Commission's general consolidation plan and promotion of public interest. See "Summary of Argument," pp. 13-14, where these categories are separately designated as *first, second* and *third.*

For the reasons hereinbefore stated, pp. 18-20, the power to impose conditions is not a standard. A standard represents an end, and the Commission's function is to see that it is attained. The power to impose conditions is simply a means—by altering the proposals of the carriers in case they are deficient—to the attainment of the specified standard.

On page 18, the same idea is stated thus: the Commission, in passing upon projected acquisitions of control "is required to pass upon three distinct questions":

1. Is the proposal in harmony with its Consolidation Plan?
2. Will the proposal "promote the public interest" from the standpoint of transportation service?
3. Are the terms and conditions of the proposal just and reasonable?

We submit that in any case where the Commission answers questions 1 and 2 affirmatively, question 3 and the need for an answer do not arise. It is only when either question 1 or question 2 is answered negatively that any further inquiry need be made; and in such case the inquiry is What terms and conditions are justly and reasonably required, by way of alteration or modification, to warrant an affirmative answer?

Counsel expand their argument on this head, saying that the Commission must find that the transaction, in addition to promoting the public interest from the standpoint of transportation service "is just and reasonable to all parties involved and directly affected." (p. 18) Who are these "parties" outside of the lessor, the lessee and the public which makes use of transportation service? Counsel mention only two—minority stockholders and employes. Their argument is that if the interests of minority stockholders can be protected by the Commission, "it certainly can protect the other", the employes. (p. 21) This argu-

ment has a twofold weakness. *First*, this Court has never decided that the Commission has power under Sec. 5(4) to protect interests of minority stockholders; a proceeding under that section is of that kind where the Commission is invested with power to free an applicant of restrictions placed upon his conduct by a statutory scheme*. But since the Commission's approval is only permissive, an applicant who has been so freed from statutory restrictions may be still bound by its private contracts, including the charter contract with its stockholders. The Commission's approval does not excuse a successful applicant from performing its contracts. *Central N. E. Ry. Co.* v. *B. & A. R. Co.*, 279 U. S. 415. So if an approved lease violates the legal rights of minority stockholders, the same judicial remedies are open for their redress as existed prior to the enactment of Sec. 5(4). *Second:* The concerns of minority stockholders and of employes are too unlike in kind to permit the conclusion that power over the one necessarily implies power over the other. Except for the convenient figment of the corporate entity, the stockholders are the corporation, and it is they who in reality are the lessor or the lessee, although conveniently designated by the corporate name of their company. The employes have no corresponding status of any kind; their relationship to the railway company occupies no higher ground in this respect than that of the adjacent property owners in *West* v. *P. B. & W. R. Co.*, 141 Atl. 509, or of the persons who hire livery cars in *Terminal Taxicab Co.* v. *Kutz*, 241 U. S. 252.

Appellants devote pages 24-32 to the proposition that the conditions imposed are just and reasonable. But the petition contains no allegation to the contrary, and therefore appellants' efforts are directed to a matter not in issue. The petition alleged, and the lower court held, that

* See *U. S., et al.*, v. *Maher*, 59 Sup. Ct. Rep. 768, 770; *Rochester Telephone Co.* v. *U. S., et al.*, 59 Sup. Ct. Rep. 754, 756.

the Commission lacked power over the subject-matter of the conditions. There was no need there or here to inquire whether, considered apart from the question of power, they are just and reasonable or are supported by the evidence of record. Of course, what appellants are trying to do is to establish that the conditions conform to the supposed standard of "just and reasonable to all parties affected thereby." But as we have previously shown, no such standard exists.

Much is attempted to be made of various matters, such as the provisions of the agreement of May, 1936, relative to payment of dismissal compensation in the event of consolidations, mergers, etc.; the action of the Baltimore & Ohio Railroad and of the Union Pacific Railroad in 1935 in agreeing to pay dismissal compensation; the Emergency Railroad Transportation Act of 1933, which limited action taken by the Coordinator under the Act to that which would not reduce the number of employes in service, etc.; and the pendency of certain bills before the present Congress providing that the Commission shall require, in approving a proposed consolidation merger, etc., a fair and equitable arrangement to protect the interests of the affected employes. Most of these matters are not in the record and reference to them is an imposition upon both the Court and appellees. The chief significance of the agreement of May, 1936, is not stated; it is that the agreement specifically provides that The Chicago, Rock Island and Pacific Railway Company and The Chicago, Rock Island and Gulf Railway Company are to be treated as *one carrier* (R. 13). Thus, the unification of these two properties is expressly without the obligation of the May, 1936, agreement to pay dismissal compensation. Notwithstanding, the employes (parties to that agreement by signature of their representatives) who appeared at the hearing before the Com-

mission, requested the imposition of the conditions in controversy (R. 12-13), and the Commission acted accordingly.

No one can dispute that a power of the kind which the Commission has here sought to exercise is large and important; so much so that one might reasonably expect, as Chairman Caskie said (R. 24) that had Congress intended to invest the Commission with that authority, it would have expressed that intention in definite and unequivocal language. Its important character is also attested by the repeated requests of the Commission to Congress that it be given such power; by the provision therefor in the bills now pending before Congress; by the recommendations on the subject contained in the Fourth Report to Congress of the Federal Coordinator of Transportation; and by the recommendation for legislation in that behalf by the so-called Committee of Six. No one can say that the subject has not been thoroughly aired during the past several years. But why is all this urging from divers quarters necessary, if the Commission already has the power? Appellants seek to escape the natural inference by asserting that these efforts are merely for the purpose of having possible doubt removed. That is a lame explanation; none of those proponents expressed any doubt. It is unlikely that the attainment of that minor objective would serve to stir up the interest shown and efforts made by them.

Next, appellants argue that the conditions *are* in the public interest (Brief, pp. 32-37). A basis for this assertion is the Commission's finding that the conditions prescribed "will promote the public interest" (p. 33). Since this finding gives rise to the very matter in controversy, it cannot serve as an argument in its own support.

Another basis is the "established determination of Congress that there is a direct relationship between the welfare of railroad employes and the maintenance of an ef-

ficient transportation system." As evidence of this determination, appellants refer to such statutes as Hours of Service Act, Safety Appliance Act, Railway Labor Act, etc. The answer is that these statutes, and others of analogous character, have a direct and immediate connection with the actual operation of the railroads; they all affect employes while in the service, but not ex-employes no longer in service.

Upon the question of the impairment of appellees' constitutional rights under the Fifth Amendment, appellants say that since "the conditions are clearly just and reasonable" no question of due process is involved. How the "just and reasonable" character of the conditions enables them to escape the operation of the Fifth Amendment, we are unable to see. Appellants give no reason beyond the bare affirmation. The compulsory payment of money by one person to another amounts to taking of property; due process forbids such taking without compensation, without something of value received in return. Here, the ex-employes give nothing and appellees receive nothing. Their former labor is fully paid for; the further payments confer no benefit upon the appellees from either the recipients or anyone else.

Mulford v. *Smith*, 307 U. S. 38, is no relevant authority. There, lack of due process was asserted on the ground that the statute operated retroactively and affected production of crops already planted. This Court denied the premise, holding that the law affected only marketing and that it took effect before the crops were ready for market. Nor are the *Second Employers' Liability Cases*, 223 U. S. 1, in point. The *welfare* referred to was "of those who are immediately concerned"; that is, employes in service and subject to present hazards.

Counsel try to distinguish *Railroad Retirement Board*

. Alton R. Co., 295 U. S. 330, in respect of the commerce power features of that case. But they point out no difference under the Fifth Amendment between compulsory payments to former employes, called "pensions," and compulsory payments to former employes, called "dismissal wages."

In Part II, appellants assert that the lower court erred in entering a decree "which purports to leave outstanding and valid an authorization which was not granted by the Commission," etc. (p. 40); and that the court should have remanded the whole proceeding to the Commission for the performance of the administrative function in a manner not inconsistent with the judgment of the court as to the validity of the conditions.

The relief granted was authorized by the statute and by the decision of this Court in the case of *United States v. Chicago, Milwaukee, St. Paul and Pacific R. Co.*, 282 U. S. 311. The statute, U. S. Code, Title 28, Sec. 41, empowers the Court to enjoin "in whole or in part" any order of the Commission; the same provision is contained in the *Urgent Deficiencies Act*, 38 Statutes at Large, 220. Grant of authority to enjoin or annul part of an order necessarily implies authority to leave outstanding the part not enjoined or annulled.

In *United States* v. *Chicago, etc., R. Co.*, 282 U. S. 311, this Court affirmed a decree which enjoined a void condition attached to the Commission's order, leaving the order, shorn of the condition, in effect. There was no remand to the Commission.

There is not even a hint in the applicable statutes that the proper procedure is for the Court to remand the whole proceeding to the Commission for further action. Where the Court finds that a part of an order of the Commission is invalid, the granting of relief by enjoining or annulling the same depends upon the severability of

such part. If it is found to be severable, in accordance with familiar principles as applied to the facts and circumstances affecting the particular order under review, the grantee may enjoin the enforcement of the void part without thereby losing the grant. *U. S.* v. *Chicago, etc., R. Co.*, 282 U. S. 311, 328. What useful purpose would be served by remanding to the Commission a proceeding in which it has already made all of the basic findings necessary to support the valid part of the order, and the subject-matter of these findings is so unrelated to that of the void part that the elimination of the latter cannot affect the former? Upon remand, the Commission could not change its previous findings which represent logical conclusions compelled by the facts of record; nor could it refuse to enter a new order supported by those findings, even though it might be disappointed in learning that its authority did not reach to the extent previously supposed. Upon remand, the Commission would possess no greater power arbitrarily to deny the approval sought by the carrier than it would have had to deny approval in the first instance in any case supported by adequate record.

Thus, if the case were remanded, the function of the Commission would be simply to enter the order with the illegal part omitted—a purely ministerial act. Appellants say there are two objections to this proposition: (1) it is impossible to predict what conclusion the Commission would reach upon a reconsideration of the case within the limits of its authority as defined by the Court, and (2) the courts have no power to substitute their judgment for that of the Commission, etc. (p. 42.)

These objections are in reality one. There is no question of substitution of court judgment for that of the Commission; the court continues to accept the judgment which the Commission arrived at from a consideration of

the legally relevant facts. The soundness and cogency of that judgment are not affected by the existence of other facts which do not bear upon and are wholly unrelated to those first mentioned. Specifically, the fact that certain employes will lose their positions and may suffer hardship in consequence, is wholly unrelated to the fact that the quantity, quality and cost of transportation service to the public will not be adversely affected by the lease. How could the Commission, if it were to reconsider the matter a thousand times, arrive at any different conclusion, even though it were compelled, in the exercise of its lawful authority, completely to forget about the employes?

This same argument was presented (and rejected) in *United States, et al.*, v. *Chicago, etc., R. Co.*, 282 U. S. 311? Counsel there said:

> "If the court set aside a condition attached to an order, leaving the order outstanding without the condition, they are deciding a different administrative question from the one passed upon by the Commission. The result sought to be accomplished by the condition might have been deemed so essential that the Commission, if it had been advised that the condition was beyond its powers, would not have issued any order, but would have issued a different kind of order." (pp. 315-316.)

Stated baldly, this argument means that unless the Commission may exercise certain powers, which it believes it has or would like to have, it may refuse to exercise such power as it lawfully possesses, even where an applicant's case fully meets the standards prescribed by the statute.

Finally, appellants say that "the Commission, in authorizing the scheme, intended the conditions to be inseparable," and that to separate the conditions "is to disregard the intent of the Commission." Surely, this Court is not prepared to hold that the Commission can, by mere intent, prevent appellees from receiving the approval to

which they are entitled under the legally relevant evidence. The Commission has no power to intend anything in derogation of that right. Its "state of mind" upon matters which it has no authority to have in mind, is immaterial.

The decree of the court below should be affirmed.

Respectfully submitted,

OTIS F. GLENN,
M. L. BELL,
W. F. PETER,
Counsel for Appellees.

November, 1939.

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IN THE

Supreme Court of the United States

No. 343

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,

Appellants,

vs.

FRANK O. LOWDEN, JAMES E. GORMAN, AND JOSEPH B. FLEMING, AS TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY AND AS TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND GULF RAILWAY COMPANY,

Appellees.

MOTION FOR LEAVE TO FILE BRIEF, CONSENT, AND BRIEF OF AMICI CURIAE

FRANK L. MULHOLLAND,
1040 Nicholas Bldg., Toledo, Ohio,
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Amici Curiae.

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TABLE OF CONTENTS

	Page
Motion for Leave to File Brief as Amici Curiae	1
Consent to Filing Brief as Amici Curiae	5
Brief of Amici Curiae	6
Nature of Issues Involved	11
Argument	14
I. The Interstate Commerce Commission Has Jurisdiction Under Sec. 5, Par. 4, to Impose Conditions for the Protection of the Interests of Employees	14
A. The Commission Has Jurisdiction to Protect Private Interests Involved in Consolidations or Acquisitions of Control	14
B. The Interests of Employees Are Germane to the Purposes of the Statute and to the Issues Involved in the Proceeding	21
Recognition by the Interstate Commerce Commission	23
Recognition by the Carriers	26
Recognition by the Congress	35
II. Injury to Employees Growing Out of Consolidations or Acquisitions of Control Are Matters Affecting the Public Interest	42
Conclusion	51

TABLE OF CASES

Associated Railways Co. Acquisition and Securities, 228, I. C. C. 277	25
Buffalo, Rochester & P. R. R., 158 I. C. C. 779	19

Page

Buffalo & Susquehanna R. R. Corp. Control, 162 I. C. C. 656 19
Chicago, R. I. & G. Ry. Co. Trustees Lease, 230 I. C. C. 181 10
Chicago, R. I. & P. Ry. Co. Trustees Merger of Operations, 221 I. C. C. 611 45
Cleveland, C., C. & St. L. Ry. Co. vs. Jackson, 22 Fed. (2d) 509. 20
Consolidations of Railroads, In the Matter of, 185 I. C. C. 403 23
Denver & Salt Lake R. R. Co., 170 I. C. C. 4 19
Louisiana & Arkansas Ry. Co. Merger, 230 I. C. C. 156. 26
New York Central Securities Corporation vs. United States, 287 U. S. 12 17
Nickel Plate Unification, 105 I. C. C. 425 18
Railroad Retirement Board vs. Alton Railroad Company, 295 U. S. 330 48
Rock Island System Consolidation, 193 I. C. C. 395 .. 45
St. Louis S. W. R. R. Co., 180 I. C. C. 175 19
St. Paul Bridge & Terminal Ry. Co. Control, 199 I. C. C. 588 24
Springfield Terminal R. R. Co., 166 I. C. C. 90 19
Unification of Lines in Southern New Jersey, 193 I. C. C. 183 24
United States vs. Chicago, M., St. Paul & Pacific Ry. Co., 282 U. S. 311 17
Upper Coos. R. R., 166 I. C. C. 76 19

TABLE OF STATUTES

1. Interstate Commerce Act—
Section 5, Paragraph 4 (U. S. C. Title 49, Section 5, Paragraph 4) 11, 14, 17, 42, 48, 50
U. S. C. Title 49, Section 5, Paragraph 2 47

2. Emergency Transportation Act, Title II—
U. S. C. Title 49, Section 257 38
U. S. C. Title 49, Section 259 39

MISCELLANEOUS CITATIONS

	Page
Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 73rd Congress, First Session, H. R. 550	40
Hearings before the Committee on Interstate Commerce, U. S. Senate, 73rd Congress, First Session, S. 1580	40
Report of President's Committee (December 28, 1938)	33
Washington Agreement of May 21, 1936	26

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Appellees.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

The undersigned hereby move the court for permission to file a brief as *amici curiae* in the above entitled action, and in connection therewith represent to the court as follows:

The question involved in this case is whether in proceedings brought by virtue of Section 5 of the Interstate Commerce Act (U. S. C. Title 49, Section 5) seeking authorization for a consolidation of carriers, or for the acquisition of control of one carrier by another, the Interstate Commerce Commission has jurisdiction to impose "just and reasonable" conditions for the protection of employees threatened with the loss of their positions.

The undersigned are the attorneys for the Railway Labor Executives' Association, an association of twenty labor organizations, who, by virtue of membership or otherwise, represent the vast majority of the employees of the railroad companies of the United States.

There are now pending before the Interstate Commission two cases, *i.e.—In the Matter of Acquisition of Control of The Colorado Southern Railway*, Finance Docket No. 12460, and *In the Matter of the Joint Application of The Minneapolis & St. Louis Railway Company and The Minneapolis & St. Louis Railroad Corporation*, Finance Docket No. 12414, to which the organizations aforesaid are parties. The first of the said cases involves identically the same, and the second substantially the same question as that presented to the court in this case. The undersigned have further been informed that other cases which will involve the same issue are in course of preparation for presentation to the Interstate Commerce Commission in the immediate future.

The interest of the undersigned, the Railway Labor Executives' Association, the labor organizations affiliated with the said association, and the many thousands of railway employees represented in the premises by the undersigned, is a continuing interest existing in equal

measure in all of the cases presently pending or anticipated in the future. As to the said cases the interests of the parties aforesaid will be foreclosed without opportunity for hearing unless the undersigned are permitted to file a brief and express their views herein as *amici curiae*.

Attorneys for both appellants and appellees have consented in writing to the filing of such brief by the undersigned as per the consent hereto attached.

Dated at Toledo, Ohio, this 1st day of November, 1939.

FRANK L. MULHOLLAND,
1040 Nicholas Bldg., Toledo, Ohio,

CLARENCE M. MULHOLLAND,
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WILLARD H. McEWEN,
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1939

No. 343

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,

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Appellees.

CONSENT TO FILING BRIEF AS AMICUS CURIAE

The undersigned, being all the parties to the above entitled action, hereby consent that a brief be filed by Frank L. Mulholland, Clarence M. Mulholland, and Willard H. McEwen, as *amicus curiae.*

(Signed) ROBERT H. JACKSON,
Solicitor General,
Attorney for Appellants.

(Signed) M. H. BELL,
W. F. PETER,
Attorneys for Appellees.

IN THE
SUPREME COURT OF THE UNITED STATES

No. 343

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,

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vs.

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Appellees.

BRIEF OF AMICI CURIAE

This action grows out of an application made to the Interstate Commerce Commission by Frank O. Lowden, James E. Gorman and Joseph B. Fleming, as trustees of the estate of The Chicago, Rock Island and Pacific Railway Company, and as trustees of the estate of The Chicago, Rock Island & Gulf Railway Company for authority permitting the former named estate to acquire by lease the railroad lines and properties of the latter. This application was heard by Division 4 of the Commission which found that the proposed transaction would be in the public interest. It was developed at the hearing, however, that if this lease were consummated a number of persons employed by the Gulf in its accounting offices at Forth Worth, Texas, would necessarily be

moved to other points on the Rock Island system, and that a number of others would entirely lose their positions. Division 4, therefore, gave its consent to the proposed lease but imposed certain conditions found by it to be just and reasonable, the said conditions being as follows, to-wit:

> "1. No employee of the trustees of The Chicago, Rock Island and Pacific Railway Company and the trustees of The Chicago, Rock Island and Gulf Railway Company, hereinafter designated as the carriers, who is continued in service shall, for a period of five years from the commencement of operation under the said lease but not beyond the date of termination, for either carrier, of the reorganization proceedings under Section 77 of the Bankruptcy Act be placed, as a result of operation under said lease, in a worse position with respect to compensation and rules governing working conditions than he occupied at the date of commencement of operation under said lease, so long as he is unable, in the exercise of his seniority rights under existing agreements, rules, and practices, to obtain a position producing compensation equal to or exceeding the compensation of the position held by him at the date of commencement of such operation; so long as he is unable to obtain a position with said trustees yielding compensation equal to or exceeding his compensation at the time of the commencement of said operation, he shall be entitled to a monthly allowance equal to the difference between the monthly compensation of the position in which he is retained and the compensation of the position from which he was displaced, the latter monthly compensation to be considered one-twelfth of the total compensation received by him in the twelve months prior to his displacement, less compensation at the rate of compensation of his retained position for any time lost on account of his voluntary absences,

provided, however, that the employee's compensation which it is the purpose of this condition to guarantee shall in no case exceed that which he received in the 12 months prior to his displacement, reduced by any change in wage scales or revision of rules detrimental to the employee, which change or revision is made to affect railroad employees generally, provided further that nothing herein shall operate to affect in any respect the retirement on pension or annuity rights and privileges in respect of any of the employees, and provided further that if any employee elects not to exercise his seniority rights he shall be entitled to no allowance.

"2. Any employee of the carriers who is deprived of employment with said carriers, hereinafter designated as a dismissed employee, because of the abolishment of his position or the loss thereof as a result of the exercise of seniority rights by an employee whose position is abolished as a result of operation under said lease, shall be accorded a monthly allowance, designated dismissal allowance, based on length of service (except in the case of an employee with less than one year of service) equivalent to 60 per cent of the average monthly compensation of said dismissed employee during the last twelve months of his employment in which he earned compensation prior to the date he is first deprived of employment. This allowance shall be made to each eligible employee while unemployed during the period beginning with the date he is deprived of employment and extending in each instance for a length of time determined and limited by the following schedule, but not beyond the date of termination of the bankruptcy proceedings involving either carrier.

Length of service	Period of Payment Months
1 year and less than 2 years	6
2 years and less than 3 years	12
3 years and less than 5 years	18
5 years and less than 10 years	36
10 years and less than 15 years	48
15 years and over	60

A dismissal allowance shall cease prior to the expiration of the prescribed period in the event of failure of the employee, without good cause, to return to service after being notified by the trustees of a position for which he is eligible, and the dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his monthly earnings in such employment and his dismissal allowance exceed the amount upon which his dismissal allowance is based. An employee shall not be regarded as a dismissed employee in case of his resignation, death, retirement on pension, dismissal for good cause, or furlough because of reduction of forces due to seasonal requirements. A dismissal allowance shall cease prior to the expiration of the prescribed period in the event of resignation, death, retirement on pension, or dismissal for good cause.

"3. Any employee retained in the services of the carriers or restored to service from the group of employees entitled to receive a dismissal allowance, who is required to change the point of his employment as a result of operation under said lease, designated as a transferred employee, and who is required, within one year from the date of commencement of operation under said lease, to move his place of residence, shall be reimbursed for expenses of moving his household and other

personal effects, for the traveling expenses of himself and his immediate family, and for his own actual wage loss, not to exceed two days, the exact extent of the responsibility of the carriers to be agreed upon in advance by the said carriers and the employee affected, provided, however, that changes in places of residence, subsequent to the initial change caused by the operation under said lease, which result from the exercise of seniority rights shall not be considered as within the foregoing provision.

"4. Any transferred employee who owns his home, or an equity therein, shall be protected against any loss suffered in the sale thereof, within one year of the effective date of operation under said lease, for not less than its fair value, said fair value to be determined as of a date 30 days prior to the filing of the application in this proceeding by the carrier, and such fair value to be agreed upon by the carriers and each employee prior to such sale and, if any transferred employee holds an unexpired lease of a dwelling occupied by him as a home, the carriers shall protect him from loss and cost in securing cancellation of his lease."

Chicago, R. I. & G. Ry. Co. Trustees Lease, 230 I. C. C. 181.

The applicant trustees protested against the imposition of these conditions, and the matter was reargued before the whole Commission which affirmed the action of Division 4 insofar as the conditions were concerned.

This suit was accordingly brought for an injunction seeking to set aside the conditions in question on the ground that the Commission had no jurisdiction to impose them. The matter was heard before a three-judge court which ruled in favor of the plaintiffs. This ruling is now before this court for review.

NATURE OF ISSUES INVOLVED

The original application to the Interstate Commerce Commission was filed pursuant to Section 5, Paragraph 4 of the Interstate Commerce Act. The principles which are to govern the Commission in proceedings of this nature are set forth in Section 5, Paragraph 4(b), the relevant portion of which reads as follows:

> " * * If after such hearing the commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and will promote the public interest, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon the terms and conditions and with the modifications so found to be just and reasonable."
>
> *U. S. C. Title* 49, *Section* 5, *Paragraph* 4(*b*).

The Commission in considering this case found that the conditions in question were "just and reasonable," and "in the public interest."

The issue presented by the case was stated by the lower court in these words:

> "There are no issues of fact involved, and the sole question to be determined is whether the Interstate Commerce Commission had the legal power to impose the conditions contained in the report of its Division Four and adopted by the entire commission in its report and order of April 3, 1939."

We have no quarrel with this statement, but on the contrary wish to emphasize its correctness. This action questions the *power* of the Commission to enter an order such as was made in this case, and not the *propriety* of the order itself in relation to the facts. Accordingly, there is no issue presented as to whether the order is reasonable in the premises, or whether it finds adequate support in the evidence. Indeed such issues could not be raised in the absence of the record of the proceedings before the Commission.

In light of the issue involved, the decision of the lower court is one of far-reaching significance. Its import is that *under no conceivable state of the evidence* in *any* case involving a consolidation of carriers, or an acquisition of control of one carrier by another, can the Commission act to protect the interests of employees, *regardless of situations or circumstances.*

Before proceeding with any further analysis of the decision of the court below it should be noted that any acquisition of control of one carrier by another, or any consolidation of carriers has necessarily a two-fold effect. The first effect is essentially private. For example, no bona fide application for authority to consummate such an acquisition or consolidation would be presented unless the proponents believed as a matter of sound business judgment that it would result in advantage to the corporations involved, which are private corporations, privately financed. Such a proposal must frequently carry with it the potentiality of private harm as well as that of private benefit. A transaction of this kind, however, does not exhaust its effects upon private parties, but in addition impinges upon the interest of the public. The

public consequences, however, do not arise independent of the private results but because of them. The latter are the intermediaries through which the effects of the consolidation or acquisition are transmitted to the public. Thus, a carrier may be financially strengthened by such an arrangement (a private benefit) and thereby its ability to render adequate service to the public increased (a public benefit). It was the possibility of public betterment or public harm which inspired the Congress to vest in the Interstate Commerce Commission a power of regulation in the premises.

The lower court interpreted the public interest as including only the interest of the traveling or shipping public. Proceeding from this interpretation, the court based its opinion on two conclusions, both of which we contend are fundamentally erroneous, and which we believe can be fairly summarized as follows:

First: While the Congress gave to the Commission power to pass upon and approve applications for authority to effect consolidations and acquisitions of control when found to be in the public interest, it gave to that body no authority to protect private interests necessarily concerned.

Second: The interests of employees are private interests purely, and therefore not subject to protection. Incidentally in this connection the court gave no consideration whatever to any possible reaction which the private injury of employees might have upon the interest of the public as that interest was interpreted by the court.

The ensuing argument in opposing the decision of the lower court will be developed according to the following outline:

I. The Interstate Commerce Commission has jurisdiction under Sec. 5, Par. 4, to impose conditions for the protection of the interests of employees.
   A. The Commission has jurisdiction to protect private interests involved in consolidations or acquisitions of control.
   B. The interests of employees are germane to the purposes of the statute and to the issues involved in the proceeding.

II. Injury to employees growing out of consolidations or acquisitions of control are matters affecting the public interest.

ARGUMENT

I. THE INTERSTATE COMMERCE COMMISSION HAS JURISDICTION UNDER SEC. 5, PAR. 4, TO IMPOSE CONDITIONS FOR THE PROTECTION OF THE INTERESTS OF EMPLOYEES.

A. The Commission Has Jurisdiction to Protect Private Interests Involved in Consolidations or Acquisitions of Control.

The natural first step in appraising the language of any statute is to consider the exact phraseology used. We reproduce for the convenience of the court the relevant terms of Section 5, Par. 4(b):

> "* * * If after such hearing the commission finds that, *subject to such terms and conditions and such modifications as it shall find to be just and reasonable*, the proposed * * * acquisition of control * * * *will promote the public interest*, it *may* enter an order approving and authorizing such * * * acquisition of control, upon the *terms and conditions and with the modifications so found to be just and reasonable.*" (Italics supplied.)

From this statutory language three conclusions may be drawn:

First: The Commission is empowered to approve a proposed acquisition of control only where such acquisition is such as will "promote the public interest." In the absence of such a showing the Commission would presumably be bound to reject the application.

Second: Where conformity to the standard of public interest is shown, the Commission "may" give its approval but is not compelled to do so. The use of the permissive "may," instead of the mandatory "shall" indicates clearly that even though the Commission finds that the public interest will be served by the acquisition proposed, there still rests in the Commission a discretion to refuse to grant the application. If so, on what basis may this discretion be exercised? The only reason of which we can conceive would be that the Commission has found that the proposal, while in the public interest, would be so inequitable or detrimental to private interests as to cause it to withhold its consent.

Third: In each case where the statute mentions the conditions which may be imposed by the Commission, it limits the power granted by requiring that these conditions be "just and reasonable." The phrase "public interest" *nowhere appears as modifying the word "conditions."* We can only conclude that the framers of the statute intended to repose in the Commission a discretion in relation to the scope of the conditions to be imposed, which was designed to be different from and broader than that contemplated by "public interest." Any other reasoning would reduce the phrase "just and reasonable" to the status of mere excess verbiage. Again

the conclusion is inescapable that Congress must have intended to vest in the Commission a jurisdiction to protect *private interests* in a proper case through the placing of "just and reasonable" conditions upon its approval of an application for an acquisition of control.

Summarizing the above, it appears that the language of the statute contemplates: (1) That the Commission may approve an application filed thereunder only when it finds that the transaction will "promote the public interest"; (2) That even after such a finding has been made, the Commission *may* reject the application if it is made to appear that private interests will be inequitably affected; (3) That the Commission may impose conditions on its application designed to protect either public or private interests, when such conditions are "just and reasonable."

We will show below that this conception of the Commission's jurisdiction is one to which the Commission itself has conformed, and which has received judicial approval. Before doing so, however, we wish to give some consideration to the constitutional adequacy of the jurisdictional limitation created by the phrase "just and reasonable." We are well aware of the constitutional requirement that power may not be delegated to an administrative body unless there is established an intelligible standard to govern the exercise of that power. In relation to the present case we do not mean to imply that the jurisdiction of the Commission under Sec. 5, Par. 4, is so broad that it may impose upon a contemplated acquisition of control conditions limited by no more definite standard than that of abstract ethics. By necessary implication the conditions must not only accord

with the ethical requirements of justice and reason, but must be germane to the matter submitted to the Commission for consideration. As stated by this court in *New York Central Securities Corporation vs. United States*, 287 U. S. 12, at page 28, conditions imposed pursuant to the terms of this section must be "appropriate to the decision which the Commission was called upon to make." We refer the court also to the case of *United States vs. Chicago, M., St. Paul & Pacific Ry. Co.*, 282 U. S. 311. This case dealt with the interpretation to be given to Section 20a, Paragraph 3, of the Interstate Commerce Act, and in particular to the jurisdiction of the Commission to impose upon its consent to the issuance of securities such conditions "as it may deem necessary or appropriate in the premises." We see no great distinction in meaning between the phrase last quoted and the language contained in Sec. 5, Para. 4(b), which is that under consideration here. In the dissenting opinion (pages 339-340) we find the following clear statement of the significance of such language:

> "Notwithstanding this broad language, it may be assumed that only those conditions which, like the present, are germane to the purposes of subsection (2) are intended; and that, consequently, only such terms and conditions may be annexed to the order as tend in some measure to remove objections to the issue, which legitimately might be the basis of withholding favorable action."
>
> (Note: The disagreement between the majority and minority opinions in this case does not in any way involve the validity of the above stated principles of law.)

It appears, therefore, that if Section 5, Paragraph 4, of the Interstate Commerce Act is interpreted as con-

ferring upon the Commission jurisdiction to protect private interests either by refusing its consent to an application filed pursuant to this paragraph, or by imposing just and reasonable conditions, a standard is prescribed which is sufficiently definite to guide the Commission in its decisions, and adequate in the face of constitutional objections. The "just and reasonable conditions" which the Commission may impose for the protection of such private interests must be "appropriate to the decision" of the Commission, must be "germane to the purposes" of the statute, and "such * * * as tend in some measure to remove objections * * * which legitimately might be the basis of withholding favorable action."

Proceeding to a consideration of the use which the Commission has made of its jurisdiction to protect private interests in these proceedings, we find its most frequent application to have been in behalf of minority stockholders who might be injuriously affected by the granting of an application as presented. The outstanding example of the exercise of such jurisdiction is to be found in the case of *Nickel Plate Unification*, 105 I. C. C. 425. After giving detailed consideration to the consolidation proposed, the Commission found on page 440 that:

> "Other meritorious groupings of these carriers might be proposed, but viewing the grouping presented in this application strictly from a transportation standpoint, we find that the proposed acquisitions of control are *in the public interest.*"
> (Note: Emphasis supplied.)

After having reached this decision, it then proceeded to an examination of the question: "Are the considerations, terms, and conditions of the proposed acquisitions

of control just and reasonable?" In proceeding to a consideration of this question it found that in case of some of the carriers control of which was to be acquired, the proposal had been forced through their respective boards of directors with little or no independent consideration; that requests for essential information by minority groups had been refused or evaded, and that the compensation or securities to be received by minority stockholders had not been determined on a basis whose fairness could be proved. Hence, although finding the proposal in the public interest from a transportation point of view, the Commission denied the application.

In a number of cases the Commission has approved proposals for the acquisition of control by the purchase of majority stock interests, but has attached conditions requiring the purchaser to offer to acquire minority interests for an equivalent consideration. *Buffalo, Rochester & Pittsburgh R. R.*, 158 I. C. C. 779; *Buffalo & Susquehanna R. R. Corp. Control*, 162 I. C. C. 656; *Upper Coos R. R.*, 166 I. C. C. 76; *Springfield Terminal R. R. Co.*, 166 I. C. C. 90; *Denver & Salt Lake R. R. Co.*, 170 I. C. C. 4; *Saint Louis Southwestern R. R. Co.*, 180 I. C. C. 175.

The court will note that in certain of these decisions the Commission has justified its action by reference, not only to the statutory provision authorizing it to impose just and reasonable conditions, but also by reference to the public interest. The Commission has not been explicit in stating the connection between the interests of minority stockholders and the interests of the public. We do not wish to be understood as arguing that there is no such connection. We merely contend that if the

interest of an employee to receive compensation for his acquired experience is purely private, then the interest of a stockholder to receive a return from his accumulated capital is likewise private. The conclusion which we draw from these cases is that in neither instance does the Interstate Commerce Act deprive the Commission of jurisdiction to protect such interests even if it is established that they are purely private in nature.

In this connection we particularly call to the attention of the court a decision of the United States Circuit Court of Appeals for the Sixth Circuit in the case of *Cleveland, Cincinnati, Chicago & St. Louis Railway Company vs. Jackson*, 22 Fed. (2d) 509. The action was one for injunction to prevent a proposed acquisition of control, an application for which had been filed with the Interstate Commerce Commission shortly before the institution of the suit. The issues presented as well as the ruling of the court are set forth in the following quotation from the opinion.

> "It is clear, we think, and indeed it is not denied, that a lease like the one involved here, if approved by the stockholders of both companies and executed on behalf of those companies, could have no effect until the Commission found that the making of the lease would 'be in the public interest,' and until it approved, not only the terms and conditions of the lease, but the consideration therefor, finding that such terms, conditions and considerations were 'just and reasonable in the premises' The plaintiff doubts that in determining the reasonableness of the terms the Commission has the right to consider the interest of minority stockholders, but admits that it 'has assumed such jurisdiction, although never confirmed by any court decision.' We think it is the duty of the Commission to *protect both the public and private inter-*

> *ests*, and although it finds that the acquisition will be in the public interest, it may not approve the lease unless it *further finds that the consideration, terms and conditions thereof are just and reasonable*—just to the lessor, the lessee, and necessarily to the stockholders of each. The ruling in *Nickel Plate Case*, 105 Interstate Com. Com'n. R. 425, evidences such an interpretation of its duties by the Commission." (Emphasis supplied.)

We conclude therefore that the decision of the lower court in this case to the effect that the Commission has no jurisdiction to impose conditions for the protection of the interests of employees *because* those interests are *private* is an entirely erroneous conclusion. The Commission has the jurisdiction to protect private interests; it has the power to do so through refusing approval of a proposed plan and through the imposition of conditions. The only limitation of its authority is that the issues presented through the assertion of these private interests must be germane to the purposes of the statute, and the conditions imposed by the Commission for their protection must be appropriate to the general decision which the Commission is called upon to make. Our next task will be one of examining the interests of the employees with regard to this requirement.

B. The Interests of Employees Are Germane to the Purposes of the Statute and to the Issues Involved in the Proceeding.

Combinations of carriers, acquisitions of control of some carriers by others, co-ordinations of services and pooling of facilities have in general one common goal. This goal is attained through eliminating duplication of

operations. The reaching of this result is the principal reason for the existence of a special policy regarding such projects in relation to carriers for by the elimination of such duplications carriers are enabled to strengthen their operating positions and offer to the public more adequate service. This is the "public interest" which the Act seeks to obtain.

These gratifying results, however, when considered from the reverse side of the picture present an entirely different aspect. Any elimination of operations means the elimination of the services of those men and women who perform the operations in question. Translated from the language of bookkeeping into that of human relationships it is apparent that any gain to the carrier or to the public is attained at the expense of an equivalent loss to employees. Whether or not the benefit is worth the price is not a question appropriate for discussion in this forum. We bring these facts to the court's attention merely for the purpose of showing that the effect of combinations, acquisitions of control, coordinations or pooling upon employees is *an inherent part of these arrangements.*

No intelligent critic would attempt to consider the problem of war, for example, and refuse to give attention to the fact that the result of a war is necessarily measured in its effect upon human lives and destinies. Is it more reasonable to insist that a responsible tribunal has been given jurisdiction to pass upon, approve or disapprove certain projected economic readjustments, yet has been denied the power to consider the inherent results of those readjustments expressed in terms of the interests of the human beings most affected?

The purpose of Section 5 of the Interstate Commerce Act, the attainment of that purpose in individual cases, and the orders of the Interstate Commerce Commission authorizing such attainment, all have as a *necessary consequence*, the loss of employment by employees. Certainly, therefore, the interests of those employees and the protection of their interests are matters inherent in and germane to the purpose of the statute.

The inescapable connection between carrier and public benefit on the one hand and private loss to employees on the other, has been consistently recognized by the Interstate Commerce Commission, by the carriers themselves and by the Congress. In the ensuing paragraphs we wish to point out to the court the instances and extent of this recognition.

Recognition by the Interstate Commerce Commission.

The Commission first recognized that the effect of consolidations upon employees was an inherent result of the consolidations themselves in its report *In the Matter of Consolidations of Railroads*, 185 I. C. C. 403, at 427, when it stated in relation to its modified plan of consolidation as follows:

> "In working out the modified plan herein approved it is expected that carriers will give careful consideration to the interests of their employees with the view of avoiding the imposition of undue hardships upon them in connection with the relocation and consolidation of shops and offices. When applications under section 5 of the act may be filed for our approval, the applicants will be expected to deal adequately with these questions and, to the extent necessary and warranted by the record, we will consider the imposition of such conditions as we may find to be proper

and within our jurisdiction. If any doubt exists as to our jurisdiction in the premises it should be safeguarded by Congress."

In the case of *Unification of Lines in Southern New Jersey*, 193 I. C. C. 183, the Commission again recognized this relationship although it refused to impose any conditions for the protection of employees because the evidence did not justify that course. The Commission said:

> "The record does not show that the proposed unification will involve a relocation and consolidation of shops and offices, which, on account of undue hardships imposed upon employees, might warrant the imposition of conditions in an authorization under section 5." (at page 198)

Two years after the announcement of the modified consolidation plan above noted the case of *St. Paul Bridge & Terminal Railway Company Control* came before the Commission. In the course of its opinion reported in 199 *I. C. C.* 588, *at pp.* 596 *and* 597 the Commission said:

> "The welfare of the employees affected by this proposal is unquestionably one of the matters of public interest which we have to consider. As we view the present case, no employee should, of necessity, be deprived of employment or be in a worse position with respect to his compensation because of the applicant's control of the terminal. Under the circumstances, we conclude that we should impose the condition in granting the application that the applicant maintain a separate seniority register for the employees of the terminal company employed in the territory now operated by it, and in future adjustments of employment resulting from necessary changes in traffic or oper-

ating conditions employees covered by such register will be given their pro rata share of the available work, and if, to maintain this relationship, transfer to other duties is required, no employee shall without his consent be in any worse position by reason of such transfer, in respect of the conditions of his service as a whole, including tenure of employment, remuneration, pensions, superannuation, sick fund, or other benefits or allowances, whether obtaining legally or by customary practice of the constituent or subsidiary company, as compared with the conditions of service formerly obtaining."

Again in the case of *Associated Railways Company Acquisition and Securities*, 228 I. C. C. 277 an application for the acquisition of control of the Minneapolis & St. Louis Railroad Company which contemplated the subsequent dismemberment of the system was disapproved by the Commission on a number of grounds, one of which is stated in the following excerpt found on page 336 of its opinion:

"Under the provisions of section 5 of the act, we may approve the proposed acquisitions only if we find that they will promote the public interest. As was stated in our report by division 4 in *St. Paul Bridge & Term. Ry. Co. Control*, 199 I. C. C. 588, 595, the public interest embraces the whole public and the public as a whole, and the interest of employees in changes of management, ownership, or operation of companies by which they are employed is a public as well as a private interest. The existing burden of unemployment on the general public is a matter of common knowledge. The dismissal of nearly 2,000 employees not only would be a great hardship on the employees themselves but would greatly increase the burden of unemployment in the communities where they reside. In

addition it would adversely affect those communities because of loss of substantial payrolls. Probably neither the amount which the applicants propose to pay the employees dismissed because of the proposed plan nor the full amount to which they would be entitled under the agreement of May 1936 would be sufficient to cover all their losses."

In the case of *Louisiana & Arkansas Railway Company Merger*, 230 I. C. C. 156 decided by Division 4 on the same day when the present case was decided, the same factors were considered, and the same ruling made as in the present case.

Thus over a period of years the Interstate Commerce Commission has frequently recognized that the effect upon employees brought about by consolidations, etc., of carriers is an integral part of such transactions, and a necessary concomitant of the very public purpose designed to be served by the statute.

Recognition by the Carriers. On May 21, 1936, there was executed at Washington, D. C., an Agreement between the representatives of some 140 railroad companies and the representatives of 20 railroad labor unions. This Agreement, known variously as the "Job Protection Agreement" or the "Washington Agreement," was signed only after long conferences and exhaustive discussions of the results of the coordination of carriers as expressed in terms of their effect upon employees. As finally consummated it constitutes a complete recognition on the part of the carriers who are parties thereto that the interest of the employees is necessarily involved in such coordinations, and is justly entitled to consideration and reasonable protection. The

Agreement has an added significance growing out of the fact that it is the source from which the Interstate Commerce Commission drew the conditions imposed in this case.

In order to demonstrate the points above noted, it will be necessary for us to quote at some length from this Agreement. The relevant portions of it read as follows:

> "Section 1. That the fundamental scope and purpose of this agreement is to provide for allowances to defined employees affected by coordination as hereinafter defined, * * *"
>
> "Section 2 (a). The term "coordination" as used herein means joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities."
>
> "Section 6 (a). No employee of any of the carriers involved in a particular coordination who is continued in service shall, for a period not exceeding five years following the effective date of such coordination, be placed, as a result of such coordination, in a worse position with respect to compensation and rules governing working conditions than he occupied at the time of such coordination so long as he is unable in the normal exercise of his seniority rights under existing agreements, rules and practices to obtain a position producing compensation equal to or exceeding the compensation of the position held by him at the time of the particular coordination, except however, that if he fails to exercise his seniority rights to secure another available position, which does not require a change in residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as

occupying the position which he elects to decline.

"(b) The protection afforded by the foregoing paragraph shall be made effective whenever appropriate through what is hereby designated as a 'displacement allowance' which shall be determined in each instance in the manner hereinafter described. Any employee entitled to such an allowance is hereinafter referred to as a 'displaced' employee.

"(c) Each displacement allowance shall be a monthly allowance determined by computing the total compensation received by the employee and his total time paid for during the last twelve (12) months in which he performed service immediately preceding the date of his displacement (such twelve (12) months being hereinafter referred to as the 'test period') and by dividing separately the total compensation and the total time paid for by twelve, thereby producing the average monthly compensation and average monthly time paid for, which shall be the minimum amounts used to guarantee the displaced employee, and if his compensation in his current position is less in any month in which he performs work than the aforesaid average compensation he shall be paid the difference, less compensation for any time lost on account of voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but he shall be compensated in addition thereto at the rate of the position filled for any time worked in excess of the average monthly time paid for during the test period.

"Section 7 (a) Any employee of any of the carriers participating in a particular coordination who is deprived of employment as a result of said coordination shall be accorded an allowance (hereinafter termed a coordination allowance), based on length of service, which (except in the case of an employee with less than one year of service) shall be a monthly allowance equivalent in

each instance to sixty per cent (60%) of the average monthly compensation of the employee in question during the last twelve months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the coordination. This coordination allowance will be made to each eligible employee while unemployed by his home road or in the coordinated operation during a period beginning at the date he is first deprived of employment as a result of the coordination and extending in each instance for a length of time determined and limited by the following schedule.

Length of Service	Period of Payment
1 yr. and less than 2 yrs.	6 months
2 yrs. and less than 3 yrs.	12 months
3 yrs. and less than 5 yrs.	18 months
5 yrs. and less than 10 yrs.	36 months
10 yrs. and less than 15 yrs.	48 months
15 yrs. and over	60 months

In the case of an employee with less than one year of service, the total coordination allowance shall be a lump sum payment in an amount equivalent to sixty (60) days' pay at the straight time daily rate of the last position held by him at the time he is deprived of employment as a result of the coordination.

"(c) An employee shall be regarded as deprived of his employment and entitled to a coordination allowance in the following cases:

1. When the position which he holds on his home road is abolished as result of coordination and he is unable to obtain by the exercise of his seniority rights another position on his home road or a position in the coordinated operation, or

2. When the position he holds on his home road is not abolished but he loses that position as a result of the exercise of seniority rights by an employee whose position is abolished as a re-

sult of said coordination, or by other employees, brought about, as a proximate consequence of the coordination, and if he is unable by the exercise of his seniority rights to secure another position on his home road or a position in the coordinated operation.

"(d) An employee shall not be regarded as deprived of employment in case of his resignation, death, retirement on pension, or on account of age or disability in accordance with the current rules and practices applicable to employees generally, dismissal for justifiable cause in accordance with the rules, or furloughed because of reduction in forces due to seasonal requirements of the service; nor shall any employee be regarded as deprived of employment as the result of a particular coordination who is not deprived of his employment within three years from the effective date of said coordination.

"(g) An employee receiving a coordination allowance shall be subject to call to return to service after being notified in accordance with the working agreement, and such employee may be required to return to the service of the employing carrier for other reasonably comparable employment for which he is physically and mentally qualified and which does not require a change in his place of residence, if his return does not infringe upon the employment rights of other employees under the working agreement.

"(h) If an employee who is receiving a coordination allowance returns to service the coordination allowance shall cease while he is so reemployed and the period of time during which he is so reemployed shall be deducted from the total period for which he is entitled to receive a coordination allowance. During the time of such reemployment however he shall be entitled to protection in accordance with the provisions of Section 6.

"(i) If an employee who is receiving a coordination allowance obtains railroad employment

(other than with his home road or in the coordinated operation) his coordination allowance shall be reduced to the extent that the sum total of his earnings in such employment and his allowance exceeds the amount upon which his coordination allowance is based; provided that this shall not apply to employees with less than one year's service.

"(j) A coordination allowance shall cease prior to the expiration of its prescribed period in the event of:

1. Failure without good cause to return to service in accordance with working agreement after being notified of position for which he is eligible and as provided in paragraphs (g) and (h).
2. Resignation.
3. Death.
4. Retirement on pension or an account of age or disability in accordance with the current rules and practices applicable to employees generally.
5. Dismissal for justifiable cause.

"Section 10 (a) Any employee who is retained in the service of any carrier involved in a particular coordination (or who is later restored to service from the group of employees entitled to receive a coordination allowance) who is required to change the point of his employment as result of such coordination and is therefore required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects and for the traveling expenses of himself and members of his family, including living expenses for himself and his family and his own actual wage loss during the time necessary for such transfer, and for a reasonable time thereafter, (not to exceed two working days), used in securing a place of residence in his new location. The exact extent of the responsibility of the carrier under this provision and the ways and means of transportation shall be agreed upon in advance be-

tween the carrier responsible and the organization of the employee affected. No claim for expenses under this section shall be allowed unless they are incurred within three years from the date of coordination and the claim must be submitted within ninety (90) days after the expenses are incurred.

(c) Except to the extent provided in paragraph (b) changes in place of residence subsequent to the initial changes caused by coordination and which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this section.

"Section 11 (a) The following provisions shall apply, to the extent they are applicable in each instance, to any employee who is retained in the service of any of the carriers involved in a particular coordination (or who is later restored to such service from the group of employees entitled to receive a coordination allowance) who is required to change the point of his employment as a result of such coordination and is therefore required to move his place of residence:

1. If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by his employing carrier for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the coordination to be unaffected thereby. The employing carrier shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other party.

2. If the employee is under a contract to purchase his home, the employing carrier shall protect him against loss to the extent of the fair value of any equity he may have in the home and in addition shall relieve him from any further obligations under his contract.

3. If the employee holds an unexpired lease of a dwelling occupied by him as his home, the employing carrier shall protect him from all loss and cost in securing the cancellation of his said lease."

(Note: Compare the above excerpts from Section 6 of the Agreement with Condition 1 imposed by the Commission; excerpts from Section 7 with Condition 2; excerpts from Section 10 with Condition 3; and excerpts from Section 11 with Condition 4.)

To this agreement the Rock Island System was and is a party.[1] By entering into this agreement the carriers generally, and the Rock Island in particular, recognized the necessary connection existing between "coordinations" and the interests of employees.

This same recognition finds further expression in another document to which we now refer. On September 20, 1938, the President of the United States appointed a committee consisting of three railroad executives and three executives of railroad labor unions for the purpose of considering the whole railroad problem and making recommendations as to government policy. On December 28, 1938, this committee tendered its report, from which we quote the following excerpt taken from page 32:

"After the details of any proposed consolidation have been determined by the interests involved, they should be embodied in an application for approval, addressed to the Transportation Board. In passing upon such an application, the Board should be governed by the following considerations:

(a) That the public interest will be served by assuring adequate transportation service;

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[1] It should be noted that the Washington Agreement itself does not apply to the present case inasmuch as intra system "coordinations" are not included within its scope.

(b) The possibility that the consolidation will isolate and injure weak railroads not included. The Board shall accordingly have the authority to require the inclusion of such roads upon equitable terms as a prerequisite to its approval;

(c) That the consolidation will not result in an increase in the total fixed charges;

(d) The interests of the employes affected. The Board shall examine into the probable results of the proposed consolidation and require, as a prerequisite to its approval, a fair and equitable arrangement to protect the interests of the said employes."

It may be objected that point (d) constitutes a recommendation for *new* legislation, and hence an admission that present legislation does not authorize a consideration of the interests of employees in such cases. It will be noted, however, that the first two of these four points are expressions of a jurisdiction already recognized as being possessed by the Commission under existing law. The third point is a specific reference to the general subject of carrier financing with regard to which the Commission has also exercised jurisdiction in relation to consolidation cases. There is no reason to believe that the committee intended its fourth point as any more of a recommendation for the conferring of a new jurisdiction than in the case of the first three. In any event, all four of these points are expressions of a jurisdiction already exercised by the Commission in such cases. The conclusion is rather that the committee intended a reiteration and clarification of a jurisdiction already believed to be in existence rather than a suggestion for the creation of new powers. This committee report is not cited as direct

authority supporting the existence of a present jurisdiction in the Commission, but rather as constituting an added recognition of the indissoluble connection existing between consolidations and coordinations and the interests of employees at whose expense they are necessarily effectuated.

Recognition by the Congress.

Section 5, Paragraph 4, of the Interstate Commerce Act was enacted in its present form as a portion of Title II of the Emergency Transportation Act of 1933. At the time of the consideration and approval of this statute the railroads of the country were facing a serious situation brought about by a decrease of the gross transportation business available and by an increase in competition for such business as remained. The purpose of the statute was to enable the railroads to meet this condition through the elimination of waste caused by needless duplications of service. The two titles of the act were closely related in purpose but provided different methods for the accomplishment of that purpose.

The first title dealt with coordinations of carriers by which was meant arrangements for joint use of facilities while the independence of the carriers themselves was fully preserved. It established administrative machinery through the office of the Federal Coordinator of Transportation whereby it was hoped that such coordinations could be brought about. This title was designed as a temporary measure only.

Title II, on the other hand, was intended to be permanent. It dealt with the same general subject matter as Title I, but concerned iteslf with pools, acquisitions of control, and combinations of carriers. It will be noted

that these devices are also methods of achieving "coordination" in a general sense, but through an actual merger, complete or partial, of the corporate agencies or the business enterprises of the carriers involved. Inasmuch as these matters and their regulation had already been considered in the Interstate Commerce Act, Title II of the Emergency Transportation Act, very naturally took the form of amendments to the earlier statute.

The points which we wish to emphasize in this connection are that Congress intended to achieve substantially the same purpose through the two titles of the statute; that that purpose could only be effected under either title by the elimination of those carrier services deemed to be duplications and wasteful, and that such elimination in either case could be effected only at the expense of the interests of employees. Otherwise stated, an injury to employees' interests was inherent in the proceedings contemplated under either title of the statute, and a showing of an appropriate recognition of that fact by Congress as to either title implies similar recognition in relation to the other.

That such a recognition was inherent in Title I cannot be doubted in view of the provisions of the statute itself, and the discussions which took place during committee hearings prior to its adoption. The Emergency Transportation Act makes certain provisions regarding coordinations effected pursuant to Title I thereof. These provisions are as follows:

> "Labor committees—(a) Appointment; hearings on contemplated orders. A labor committee for each regional group of carriers may be selected by those railroad labor organizations which, as representatives duly designated and authorized to act in accordance with the requirements of the Rail-

way Labor Act (45; c. 8), entered into the agreements of January 31, 1932, and December 21, 1932, with duly authorized representatives of the carriers, determining the wage payments of the employees of the carriers. A similar labor committee for each regional group of carriers may be selected by such other railroad labor organizations as may be duly designated and authorized to represent employees in accordance with the requirements of the Railway Labor Act (45; c. 8). It shall be the duty of the regional coordinating committees and the Coordinator to give reasonable notice to, and to confer with, the appropriate regional labor committee or committees upon the subject matter prior to taking any action or issuing any order which will affect the interest of the employees, and to afford the said labor committee or committees reasonable opportunity to present views upon said contemplated action or order."

"(b) Employees; limitation on reduction in number and compensation. The number of employees in the service of a carrier shall not be reduced by reason of any action taken pursuant to the authority of this title (chapter) below the number as shown by the payrolls of employees in service during the month of May, 1933, after deducting the number who have been removed from the payrolls after the effective date of this Act (June 16, 1933) by reason of death, normal retirements, or resignation, but not more in any one year than 5 per centum of said number in service during May, 1933; nor shall any employee in such service be deprived of employment such as he had during said month of May or be in a worse position with respect to his compensation for such employment, by reason of any action taken pursuant to the authority conferred by this title (chapter)."

"(d) Property losses and expenses on transfer of employees; compensation. The coordinator is authorized and directed to provide means for

determining the amount of, and to require the carriers to make just compensation for, property losses and expenses imposed upon employees by reason of transfers of work from one locality to another, in carrying out the purposes of this title (chapter)."

U. S. C. Title 49, *Sec.* 257.

We further wish to call attention to another provision of Title I of this Act which establishes a procedure for appeals from orders of the Coordinator of Transportation to the Interstate Commerce Commission. The language establishing the jurisdiction of the Commission on appeal is significant and reads as follows:

"Any interested party, including, among others, any carrier, subsidiary, shipper, or *employee*, or any group of carriers, shippers, or *employees*, or any state commission, or the governor of any state, or the official representative or representatives of any political subdivision thereof, dissatisfied with any order of the coordinator may, at any time prior to the effective date of the order, file a petition with the Commission asking that such order be reviewed and suspended pending such review, and stating fully the reasons therefor. Such petitions shall be governed by such general rules as the Commission may establish. If the Commission, upon considering such petition and any answer or answers thereto, finds reason to believe that the order may be *unjust to the petitioner or inconsistent with the public interest*, the Commission is hereby authorized to grant such review, and, in its discretion, the Commission may suspend the order if it finds immediate enforcement thereof would result in *irreparable damage to the petitioner, or work grave injury to the public interest*, but if the Commission suspends an order, it shall expedite the hearing and decision on that order as much as possible. Thereupon the

Commission shall, after due notice and a public hearing review the order and take such action in accord with the purposes of this title (chapter) as it finds to be *just and consistent with the public interest*, either confirming the order or setting it aside or reissuing it in modified form, and any order so confirmed or reissued shall thereafter remain in effect until vacated or modified by the Commission." (Emphasis supplied.)

U. S. C. Title 49, *Section* 259.

It will be noted that on final hearing under this section the Commission is empowered to confirm or set aside an order of the coordinator according to its finding that such order is or is not "just and consistent with the public interest." It is plain from a consideration of the preceding language that the word "just" was meant to include justice to private interests, the interests of employees among the number.

We have heretofore called attention to the fact that the Interstate Commerce Commission, acting under Section 259 (a part of Title I of the Emergency Transportation Act) would necessarily be called upon to consider the same general type of transaction as though it were acting under Section 5, Paragraph 4, as amended by Title II of this same Act. The interests of employees are as much a factor in the one situation as in the other. If the word "just" as used in Section 259 was intended to refer to employees' interests there is every reason to believe that Congress understood that the same word as appearing in Section 5, Paragraph 4, had the same meaning and conferred the same jurisdiction upon the Commission.

The discussions of this problem which took place during the Committee Hearings prior to the adoption of this Act were too extensive to reproduce here in full. We refer the court to Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 73rd Congress, First Session, HR. 550, page 57, 86 *et seq.*, and page 162. Also, the Hearings before the *Committee* on Interstate Commerce, U. S. Senate, 73rd Congress, First Session, S. 1580, page 115 *et seq.*

It is conceded that the statutory language above quoted, and discussions in committee related primarily to the provisions of Title I of the Act. If Congress had the interest of employees in mind as being inherently involved in coordinations of carriers effected under Title I, and made such specific provisions for that protection, it may be asked as to why similar provisions were not inserted in Title II regarding other phases of the same problem. Only two possible answers to this question occur to us. Either Congress intended to deny to employees protection for their interests in proceedings under Title II, or it believed that provision was made for that protection. In light of the discussions in committee already referred to, it seems impossible that Congress could have given such careful and solicitous attention to the interests of employees under one Title of the Act and have been entirely unmindful of them in exactly the same situation arising under the other Title. The second alternative, therefore, appears to be more reasonable. We believe that there is a logical reason for the difference of language found in the provisions of these two Titles. Title I of this statute made provision for voluntary coordinations but added the extra sanction

of a measure of compulsion which could be applied by the Federal Coordinator of Transportation. It was eminently reasonable, therefore, that Congress should specifically enjoin upon the coordinator certain conditions which he must keep in mind in all questions of coordination. Under Title II, however, no governmental compulsion was contemplated. Hence no injurious effect upon employees from that source needed to be considered. Congress must have recognized that any consolidations, pooling arrangements, or acquisitions of control, authorized thereunder must first receive the approval of the Interstate Commerce Commission, to whose discretion was entrusted the imposition of conditions upon any proposal submitted to it.

The most reasonable conclusion, therefore, is that Congress when it enacted this statute fully recognized that the employees' interests were inherent in and germane to the purposes of the statute. In Title I it stated specifically the measure of protection to be accorded them. In enacting Title II, however, the Congress must have recognized that the Interstate Commerce Commission had the power to grant such protection by virtue of its authority to impose "just and reasonable conditions," and that no need existed to spell out any exact rule in the statute.

To summarize all of the foregoing, we have assumed that the interests of employees in cases of this kind were purely private in nature, and have seen that the Interstate Commerce Act conferred upon the Commission jurisdiction to act for the protection of such private interests in proper cases. We have supported this conclusion by an examination of the terminology of the Act itself and by a consideration of cases interpreting it.

We have noted that the power of the Commission to impose just and reasonable conditions for the protection of private interests is limited to cases where the interests protected and the conditions imposed are germane to the purpose of the statute. We have seen that the purpose of this statute is to rid the carriers of the burden of needless duplications of effort and services, and that such a purpose can only be effectuated through a corresponding loss to employees. The two are necessarily and inescapably connected. Neither can be intelligently considered without reference to the other. This fact, as we have shown, has been repeatedly recognized by the Commission, by the carriers, and by the Congress. From these facts we conclude that employees' interests are inherently involved in and germane to the problem of acquisitions of control of one carrier by another, and hence that the Commission has jurisdiction to impose conditions protecting those interests, so long as the conditions in question are just and reasonable.

II. INJURY TO EMPLOYEES GROWING OUT OF CONSOLIDATIONS OR ACQUISITIONS OF CONTROL ARE MATTERS AFFECTING THE PUBLIC INTEREST.

There has been some controversy in this and in other cases as to whether the phrase "public interest" as used in Section 5, Paragraph 4, of the Interstate Commerce Act is to be construed in a narrow sense as contemplating the interest of the public in the conduct of the nation's transportation system, or in a broader sense as including the more general interests of all sections of

the public which may be involved in a specific case. We do not propose to consider here the pros and cons of this controversy. Without in any way attempting to state an opinion regarding contentions which may be made by the parties to this case, we wish to make it clear that for the purposes of this argument we are adopting the narrower conception of public interest and will consider the matter purely from the transportation point of view. So considered, however, the phrase "public interest" is sufficiently broad to include the public effect of wholesale dismissals of employees as a result of consolidations of carriers or acquisitions of control of certain carriers by others. It must be conceded, of course, that if the fifty-odd employees of the Chicago, Rock Island & Gulf Railroad, and of its trustees who are directly involved in this case are dismissed from service, the interest of the public in them and in their work ceases with the severing of the connection between them and the transportation industry. The consequences of their dismissal, however, will not be limited to this particular railroad or this particular case. The repercussions will be felt on every railroad where a similar move is contemplated. The public interest which we assert is not that of a public concern regarding the fate of these dismissed employees, but rather of a public concern regarding the morale of employees who are still at work on this and other carriers pending a decision regarding their dismissal as a consequence of other combination proceedings.

To realize the importance of this situation it is necessary that the court have clearly in mind certain of its practical features. On the railroads of the country em-

ployees are accorded what are known as seniority rights. Typically, such rights entitle the individual employee to a preference in his employment in ratio to the length of his service period with the railroad. The general recognition of such rights has developed from two factors: First, the desire of the employee for a more secure tenure of employment, particularly in his declining years, and, second, the desire of the carrier to minimize labor turnover and assure for itself an adequate supply of trained and experienced employees to assist in the conduct of the business of railroading—one where training and experience are peculiarly essential. Typically, too, employees hold what is generally known as "division" or "point" seniority. Thus a train or engine service man is normally limited in the exercise of his seniority rights to a certain operating division of the railroad, while a mechanic or clerk is limited to a certain shop or office. If, as a result of the consolidation, a division, shop or office is abandoned, the seniority rights of all employees working there are destroyed. If the railroad industry were one offering increasing opportunity for employment this situation would not be serious, for the employee dismissed at one point might soon find new employment at another. It is a well known fact, however, that in recent years the railroads have been decreasing their working forces rather than increasing them. At every point where a seniority roster is maintained there is a long list of furloughed men, trained and experienced, who hold seniority rights as to positions at that point and who are anxiously awaiting reinstatement. The employee who is dismissed from a position at a point which has been abandoned as a result of a consolidation occupies the same status as a new applicant for employment

at any other point where he may seek work. Thus it follows that any employee at a point which would be abandoned in the event of consolidation is facing the prospect of a complete loss of means of earning a livelihood, if the consolidation is effected. That such a prospect is not conducive to a high morale or a high standard of working efficiency is obvious.

Again the situation might not be so critical if only casual efforts were being made to consolidate carriers or coordinate their operations, but such is not the case. A well developed movement is and has been in progress to effect such transactions on a wholesale basis. This movement is not only the result of carrier initiative, but is one fostered and encouraged by the federal government. It has been proceeding for a number of years and no doubt will continue for many years to come.

An excellent example of the situation is that afforded by the history of the two carriers involved in this case. Efforts to effect a combination have been in progress since August 24, 1932, when an application was filed with the Commission for approval of a complete merger of all of the lines in the Rock Island system. This application was granted but upon conditions which the applicant refused to accept. (See *Rock Island System Consolidation*, 193 I. C. C. 395.) The next step was taken in 1937 when the trustees of these two corporations made application for approval to merge the operation of the two estates. This application was dismissed by the Commission for lack of jurisdiction. (See *Chicago, Rock Island & Pacific Railway Company Trustees Merger of Operations*, 221 I. C. C. 611.) Both of these proposals involved elimination of the same group of employees

which is concerned in the present case. What must have been the mental attitude of these men and women who for a period of seven years have worked at the business of transportation while over their heads this sword was suspended by so meager a thread? Can it be believed that during that period their services constituted effective contributions to the carrying on of the business of transportation?

A number of years ago the state of Texas enacted a statute requiring that all railroad companies operating in the state must maintain therein their general shops and offices. Many of the large railroad systems desired to conduct railroad operations in Texas and were compelled to resort to the device of subsidiary companies. It has been recently established that this state law must give way before the Federal policy of consolidation as expressed in the Interstate Commerce Act. The inevitable result has been and will be that other systems like the Rock Island will apply for permission to consolidate their operations with those of their Texas subsidiaries. Thus we see that the situation of these Rock Island employees is shared by those of many other railroads in the state of Texas, and these other workers have reasonable grounds for apprehension as to the future of their positions. We are not citing the above example in an attempt to uphold the Texas statute, but merely to show that we have here a state-wide situation, not limited to the lines of the Rock Island.

Nor is this condition limited to a single state. It is nation-wide in scope. In 1920 encouragement of railroad consolidation became an integral part of federal policy, for in the Transportation Act of that year the Interstate

Commerce Commission was instructed to draw up a plan whereby the various railroads of the country were to be allocated among a limited number of large systems. (See *U. S. C. Title* 49, *Section* 5, *Paragraph* 2.) Such a plan has been prepared and published by the Commission. While the effects of this statutory provision are of doubtful value, there is no question but that it constituted an official recognition of the fact that the small railroads could scarcely hope for a long continued independent existence disassociated from the operations of some one of the larger systems. Notice was officially served upon the employees of such roads that many of them had but tenuous holds upon their positions. The provisions of the Emergency Transportation Act, already discussed at some length herein, served to emphasize these warnings.

As a result of the above and of the acts of the carriers in taking advantage of their statutory opportunities, there arose a widespread unrest among railroad employees generally, and among those in the service of the smaller lines in particular. An agitation developed to secure for these employees a measure of protection against the anticipated elimination of their opportunities for earning a living. This agitation culminated in the so-called Washington Agreement, which has also been given consideration above. Why were the carriers willing to execute this Agreement? We do not accuse railroad management of inhumanity, but on the other hand we do not credit it with motives purely philanthropic and disconnected with the corporate interests which it serves. It seems, therefore, apparent that the representatives of management were willing to execute the Washington agreement because they felt that the allaying of the fears

of the employees would do much to eliminate the unrest and lowered morale incident to the whole consolidation situation, and would improve the general efficiency of the industry. It is to be noted that this improved efficiency is the source of that very public interest which Section 5, Paragraph 4, of the Interstate Commerce Act was designed to preserve.

That the morale of employees is a matter vitally related to the public interest is clearly developed in the dissenting opinion in the case of *Railroad Retirement Board vs. Alton Railroad Company*, 295 U. S. 330. It is true that the question there considered was one of the existence of federal power, while here we are concerned with the question of whether or not that power was exercised. A reading of the opinion will reveal, however, that essentially the dissenting justices were considering the existence of a public interest in interstate commerce sufficient to support the regulation in question. When, as here, the power to pass upon questions of public interest has been delegated to an administrative commission and a question has been raised as to the extent of the power given, the same reasoning is applicable. We submit the following quotations from the opinion as constituting a clear discussion of the factors involved, and as being relevant to the issues raised in this case.

> "It was inevitable that, with the development of the transportation system of the country, requiring a vast number of employees, there should have been a growing appreciation of the importance of conditions of employment. It could not be denied that the sovereign power to govern interstate carriers extends to the regulation of their relations with their employees who likewise are engaged in interstate commerce. The scope of this sort of

regulation has been extensive. There has been not only the paramount consideration of safety, but also the recognition of the fact that fair treatment in other respects aids in conserving the peace and good order which are essential to the maintenance of the service without disastrous interruptions, and in promoting the efficiency which inevitably suffers from a failure to meet the reasonable demands of justice. An absolute duty to furnish safety appliances has been imposed, restrictions of hours of continuous service have been prescribed, standards of a day's work have been established for work and wages, the liability of carriers for injuries to employees has been regulated by the abrogation of the fellow servant rule and the limitation of defenses as to contributory negligence and assumption of risk, and provisions have been enacted to facilitate the amicable settlement of disputes and to protect employees in their freedom to organize for the purpose of safeguarding their interests. *St. Louis, I. M. & S. R. Co. vs. Taylor,* 210 U. S. 281, 52 L. Ed. 878, 31 S. Ct. 621; *Wilson vs. New,* 243 U. S. 332, 61 L. Ed. 755, 37 S. Ct. 298, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024; *Texas & N. O. R. Co. vs. Brotherhood of R. & S. S. Clerks,* 281 U. S. 548, 74 L. Ed. 1034, 50 S. Ct. 427.

After considering the above and other related matters the writer continues thus:

> "* * * I think that it is clear that the morale of railroad employees has an important bearing upon the efficiency of the transportation service. * * *"

From all of the foregoing we conclude, therefore, first, that the morale of railroad employees generally has been, is being, and will be injuriously affected by the current movement toward consolidation of the corporate agencies, the properties, and the operations of carriers;

and, second, that such an effect is within the scope of that public interest whose protection was entrusted to the Interstate Commerce Commission by Section 5, Paragraph 4, of the Interstate Commerce Act.

In this case the commission acted to eliminate the source of the evil, in part at least, by providing that employees who were retained in the service after the consummation of the lease which was authorized, should find themselves in no worse position financially than before; that the carriers must bear the burden of certain incidental financial losses due to transfers of employees who might be shifted to other points on the system, and that employees released from service were to receive a readjustment allowance for a limited period of time, or until they were actually able to readjust their lives to changed conditions and circumstances. We do not believe that these requirements can be challenged as unjust or economically unsound. They appear to be well designed to afford reasonable protection to the interests of the employees involved in this case, a reasonable assurance to other employees who are or may be similarly situated that they may henceforth proceed with their regular tasks unhampered by concern lest their positions be abolished and their interests ignored, and further that they provide a reasonable protection of the public interest inherent in this whole situation.

CONCLUSION

In conclusion we again emphasize the far-reaching importance of the issue which the court is called upon to decide. This is not only a proceeding designed to question the propriety of a particular order of the Interstate

Commerce Commission, but one intended to challenge the jurisdiction of the Commission to enter any order looking to the protection of employees' interests in any similar case. If this contention is maintained, it will have an effect far more extensive than that exercised upon the comparatively small group of workers who are directly involved. A consolidation of carriers may involve the interests of a dozen employees or of many thousands. (Cf. *Associated Railways Company Acquisition and Securities*, 228 I. C. C. 277, where it was estimated that 2,000 workers would be thrown out of employment if the suggested plan were consummated.) The decision of the lower court if permitted to stand will deprive the Commission of power to consider these substantial interests in any case, or under any circumstances, and no order can henceforth be made by it, or no conditions imposed which will afford that protection however just or reasonable such order or conditions may be.

In support of our contention that the decision of the lower court is erroneous we have shown:

First, If the employees' interests are considered to be purely private they are still subject to the protection of the Commission in a proper case, and the Commission and the courts have both upheld the existence of a jurisdiction to protect them.

The interests in question and the protection accorded by the Commission are germane to and inherent in the purposes of Section 5 of the Interstate Commerce Act, and have been so recognized by the Commission, the carriers themselves and the Congress. It is illogical to suppose that the Commission has been given jurisdiction to rule upon the propriety of a consolidation matter and yet

denied jurisdiction to consider an inevitable and inherent consequence of the course of action proposed.

Second, If, on the other hand, we consider that the Commission's jurisdiction is in some manner limited to considerations affecting the "public interest," we have shown that a denial of protection to employees in this sort of case must necessarily react directly upon employee morale and will result in a lessening of the efficiency of the agencies of transportation. Such an effect is a matter of public interest however narrowly that term may be defined.

Therefore, whether the case be considered as one involving public interest or private interest, it appears that the Commission was acting within the scope of its jurisdiction in attaching to its order the conditions in question. It follows, accordingly, that the ruling of the District Court was erroneous and should be reversed.

Respectfully submitted,

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Toledo, Ohio, November 1st, 1939.

I do hereby certify that copies of the within motion, consent and brief have been delivered to the office of the Solicitor General of the United States and further copies have been mailed to Messrs. M. H. Bell and W. F. Peter, attorneys for the appellees.

WILLARD H. MCEWEN,

Corrected copy.

p. 11, 8

SUPREME COURT OF THE UNITED STATES.

No. 343.—October Term, 1939.

The United States of America and the Interstate Commerce Commission, Appellants, *vs.* Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, as Trustees of the Estate of the Chicago, Rock Island and Pacific Railway Company Etc.	Appeal from the District Court of the United States for the Northern District of Illinois.

[December 4, 1339.]

Mr. Justice Stone delivered the opinion of the Court.

This appeal raises the question whether the Interstate Commerce Commission, in approving and authorizing a lease of a railroad by one railroad company to another, under § 5(4)(b) of the Interstate Commerce Act as amended, (48 Stat. 217, 49 U. S. C., § 5(4)(b) enacted in substance as § 407(5)(6) of the Transportation Act of 1920, 41 Stat. 481), has authority to prescribe as a condition of its order, that certain employees of the lessor shall receive partial compensation for the loss which they may suffer, by reason of their discharge or transfer as a result of the lease.

Appellees are trustees of the Chicago, Rock Island & Gulf Company and of the Chicago, Rock Island & Pacific Railway Company, both in bankruptcy for purposes of reorganization under § 77 of the Bankruptcy Act. They applied to the Interstate Commerce Commission for authority under § 5(4)(b) to lease the railroad and properties of the Gulf Company to themselves as trustees of the Pacific Company at an annual rental equal to the net operating income of the leased property. On the application, which was twice heard by the Commission, evidence was submitted from which the Commission found that the Gulf Company, whose entire capital stock is owned by the Pacific Company, is owner of six hundred and thirty-two miles of railroad in Texas which it operates sep-

arately from the 8,138 miles of railroad of the Pacific Company; that the purpose of the proposed lease was to combine the operation of the two lines in order to effect savings in operating costs through the elimination of the Texas accounting offices of the Gulf Company.

The Commission found that the lease would not impose upon the public any change in conditions affecting train operation; that it would have no effect on rates or routes and would result in no change of service to the public. It found that the elimination of the Texas accounting offices would result in an annual saving of $100,000, six or seven thousand dollars of which would accrue to the Gulf Company and the remainder to the Pacific Company, to be effected through the ultimate dismissal of forty-nine of the Gulf accounting employees and the transfer of twenty others to the Chicago offices of the Pacific Company. The Commission also found that the welfare of the employees affected by the elimination of the accounting office is one of the matters of public interest which the Commission must consider in proceedings under § 5(4)(b).

It accordingly authorized the lease upon the conditions which it found to be just and reasonable: that for a period not exceeding five years each retained employee should be compensated for any reduction in salary so long as he is unable, in the exercise of his seniority rights under existing rules and practices to obtain a position with compensation equal to his compensation at the date of the lease; that dismissed employees unable to obtain equivalent employment be paid partial compensation for the loss of their employment in specified amounts and for specified periods depending on the length of their service, and that the transferred employees be paid their traveling and moving expenses including losses incurred through being forced to sell their homes. The maximum cost of compliance with the conditions, it was found, would be $290,000 spread over a period of five years, during which the savings effected by the lease would be not less than $500,000. The Commission found that the proposed lease, with the specified conditions "will be in harmony with and in furtherance of our plan for the consolidation of railroad properties and will promote the public interest."

In the present suit, brought by appellees, the district court of three judges (Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 219, 28 U. S. C. §§ 45, 47a, granted the relief sought, and de-

creed that the conditions of the Commission's order be set aside and that the Commission be enjoined from enforcing them. The case comes here on appeal under § 238 of the Judicial Code, 28 U. S. C., § 345.

Appellees contend, as the district court held, that the Commission was without the authority of any act of Congress to attach the prescribed conditions to its order. Consequently, they argue that the courts may appropriately set them aside as of no effect, leaving the remainder of the order to stand as the Commission's unqualified approval of the lease, although the Commission gave no indication that it would have authorized the lease without the conditions.

Section 5(4)(a) provides that "it shall be lawful, with the approval . . . of the Commission, as provided in subdivision (b), for two or more carriers to consolidate or merge their properties . . . or for any carrier . . . to . . . lease . . . the properties of another . . . " Subdivision (b) provides that the Commission on application by the carrier or carriers concerned may, after hearing, authorize such a consolidation or lease, and directs that "if after such hearing the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed consolidation . . . [or] lease . . . will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3) and will promote the public interest, it may enter an order approving such consolidation . . . [or] lease . . . upon the terms and conditions and with the modifications so found to be just and reasonable."

In *New York Central Securities Co.* v. *C. C. C. & St. L. Ry. Co.*, 287 U. S. 12, we pointed out that the phrase "public interest" in this section does not refer generally to matters of public concern apart from the public interest in the maintenance of an adequate rail transportation system; that it is used in a more restricted sense defined by reference to the purposes of the Transportation Act of 1920, of which the section is a part and which, as had been recognized in earlier opinions of this Court, sought through the exercise of the new authority given to the Commission to secure a more adequate and efficient transportation system. See *New England Divisions Cases*, 261 U. S. 184; *Dayton-Goose Creek Ry.* v. *United States*, 263 U. S. 456; *Texas & Pacific Railway Company* v. *Gulf, Colorado & Santa Fe Railway Company*,

270 U. S. 266, 277. Thus restricted, the term public interest "as used in the statute, is not a mere general reference to public welfare but as shown by the context and purposes of the Act has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency and to appropriate provision and best use of transportation facilities." *Texas* v. *United States*, 292 U. S. 522, 531.

Appellees do not challenge the Commission's contention that the conditions are germane to the transaction involved in the lease because the purpose of the conditions is to mitigate the direct effect of the lease upon the employees. See *United States* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company*, 282 U. S. 311, 324, 339, 340. But they insist that the conditions which the Commission is permitted by this section to attach to its order must also conform to the standard of public interest which the statute sets up to guide the Commission's action. From this premise they argue that the prescribed conditions are unauthorized because unrelated to the public interest in its statutory sense. They maintain that a carrier's employees, as such, are not part of the public whose interest is to be promoted by the lease, and that their interest in keeping their employment without loss of compensation is of private concern and no part of that public interest in the maintenance of an adequate and efficient transportation system which the statute contemplates.

Accepting the premise, as we may for present purposes, without considering the contention of the Commission that the conditions if just and reasonable, need not be related to the other statutory standards, the issue is narrowed to a single question whether we can say, as matter of law, that the granting or withholding of the protection afforded to the employees by the prescribed conditions can have no influence or effect upon the maintenance of an adequate and efficient transportation system which the statute recognizes as a matter of public concern.

Appellees do not attack the sufficiency of the evidence on which the Commission's findings are based, and that evidence was not submitted to the district court for review. Hence we are free to disturb the findings only if we can say that there can be no rational basis for them. *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 304; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146.

Appellees do not deny that the use of part of the savings resulting from the lease to compensate the employees for the loss which it will occasion, is just and reasonable so far as the interest and relations of employer and employee are concerned; or that the lease will be in harmony with and further the Commission's plan for consolidation of the railroads as the Commission found. They urge only that the conditions imposed can have no relationship to the maintenance of an adequate and efficient transportation system and in consequence cannot in any circumstances be said to promote the public interest in the statutory sense.

The proposed lease in its relation to the transfer or dismissal of employees and to an adequate and efficient transportation system, is not to be viewed as an isolated transaction or apart from the Commission's plan for consolidation of the railroads. As a result of the enactment of the Transportation Act in 1920, consolidation of the railroads of the country, in the interest of economy and efficiency, became an established national policy, and the effective consolidation of the railroads in conformity to the provisions of the Act and to the plan of consolidation which the Commission was directed to prepare became a matter of public interest. The policy of consolidation is so intimately related to the maintenance of an adequate and efficient rail transportation system that the "public interest" in the one cannot be dissociated from that in the other. Hence, in considering whether the public interest under § 5(4)(b) will be promoted by the conditions of an order authorizing a consolidation or lease, the Commission is free to consider their effect upon the national policy of consolidation as well as their more immediate effect on the adequacy and efficiency of the transportation system.

Obedient to the mandate of § 5(2) of the Act the Commission has prepared and published a plan under which it is proposed that the railroads of the country be consolidated into a limited number of large systems. *Consolidation of Railroads*, 159 I. C. C. 522, 185 I. C. C. 403. By § 5 of the Act the ban on consolidation of railway carriers was removed, and acting under it the Commission has granted authority for numerous consolidations and leases in furtherance of the plan. In the preparation and execution of the plan it speedily became apparent that the great savings which would result from consolidation could not be effected without profoundly affecting the private interests of those immediately concerned in the maintenance of the existing nationwide railway system, the railroad

security holders and employees. The security holders are usually, though not always favorably affected by economies resulting from consolidation.[1] But the Commission has estimated in its report on unification of the railroads that 75% of the savings will be at the expense of railroad labor. Not only must unification result in wholesale dismissals and extensive transfers, involving expense to transferred employees, but in the loss of seniority rights which, by common practice of the railroads are restricted in their operation to those members of groups who are employed at specified points or divisions. It is thus apparent that the steps involved in carrying out the Congressional policy of railroad consolidation in such manner as to secure the desired economy and efficiency will unavoidably subject railroad labor relations to serious stress and its harsh consequences may so seriously affect employee morale as to require their mitigation both in the interest of the successful prosecution of the Congressional policy of consolidation and of the efficient operation of the industry itself,[2] both of which are of public concern within the meaning of the statute.

One must disregard the entire history of railroad labor relations in the United States to be able to say that the just and reasonable treatment of railroad employees in mitigation of the hardship imposed on them in carrying out the national policy of railway consolidation, has no bearing on the successful prosecution of that policy and no relationship to the maintenance of an adequate and efficient transportation system. As was pointed out by Com-

[1] In several cases the Commission has disapproved proposals for consolidations and for acquisition of control because of a failure to deal fairly with minority stockholders. Nickel Plate Unification, 105 I. C. C. 425; Unification of Southwestern Lines, 124 I. C. C. 401. In others it has approved the proposal on condition that these objections be removed. Buffalo, Rochester & Pittsburgh R. R., 158 I. C. C. 779; Buffalo & Susquehanna R. R. Corp Control, 162 I. C. C. 656; Upper Coos R. R., 166 I. C. C. 76; Springfield Terminal R. R. Co., 166 I. C. C. 90; Denver & Salt Lake R. R. Co., 170 I. C. C. 4; Saint Louis Southwestern R. R. Co., 180 I. C. C. 175. See United States v. Chicago, Milwaukee, St. P. & Pac. R. Co., 282 U. S. 311, 337.

[2] On several occasions strikes of railroad employees affected by consolidations of plant facilities have threatened. To avoid interruption of transportation service an Emergency Board was invoked in 1929 under the Railway Labor Act of 1926 to arbitrate the dispute between the railroad and the employees of the Texas & Pacific Railway Company. The Board awarded the employees compensation for loss from depreciation of the value of their homes (cf. Clause 4 in the order here involved). The Board, after extensive hearings, found that such a requirement was reasonable in view of the fact that railroads themselves had on several prior occasions compensated the employees affected. 28 Monthly Labor Review, 1191 (1929). See also 43 Monthly Labor Review, 867 (1936) where dismissal compensation was agreed upon in similar circumstances under threat of a strike.

missioner Eastman in his concurring opinion in this case the protection afforded to employees by the challenged conditions is substantially that provided in event of consolidation by an agreement entered into in May, 1936, between 219, the great majority, of the railroad lines of the country, and 21 labor organizations.[3] He also directed attention to the fact that the Committee of Six, three of whom were railroad executives, in their report to the President of December 23, 1938, recommended that the federal agency passing upon railroad consolidation "require as a prerequisite to approval a fair and equitable arrangement to protect the interests of . . . employees",[4] and that this report had been approved by the directors of the Association of American Railroads.

We can hardly suppose that the railroads, in entering into this agreement and endorsing this recommendation left out of account their own interest in the maintenance of transportation service or that their interest in this respect differs or is separable from that of the public interest. In fact, before this action by the railroads the Commission itself had taken the view that the welfare of dismissed employees must be considered in passing upon proposed consolidations,[5] and in its sixth annual report in 1892 it declared in recognition of the same principle, that "relations existing between railway corporations and their employees are always of public interest."[6] The Federal Coordinator of Railroads, in his fourth annual report to Congress in 1936, recommended the enactment of a comprehensive system of dismissal compensation, stating that such a system "would enhance the safety or efficiency of railroad service." H. Doc. No. 394, 74th Cong., 2nd Sess., p. 56.[7]

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[3] The Chicago, Rock Island & Pacific System, represented here by appellee, was a party to this agreement. 42 Monthly Labor Review 1503 (1936); 57 Traffic World 995 (1936).

[4] Report of Committee appointed September 20, 1938, by the President of the United States, to submit recommendations upon the general transportation situation (December 23, 1938).

[5] Consolidation of Railroads, 185 I. C. C. 403, 427; Unification of Lines in Southern New Jersey, 193 I. C. C. 183, 198; St. Paul Bridge & Terminal Railway Co. Control, 199 I. C. C. 588. For later cases to the same effect, see Associated Railways Company Acquisition and Securities, 228 I. C. C. 277, 336; Louisiana & Arkansas Ry. Co., Merger, 230 I. C. C. 156; Louisiana & Arkansas Ry. Co., Control, 233 I. C. C. 37, 123.

[6] Sixth Annual Report of Interstate Commerce Commission (1892), p. 323.

[7] For a similar conclusion, see J. Douglas Brown, et al., Railway Labor Survey, Social Science Research Council, Division of Industry & Trade (1933), 1, 94; Robertson, The Stake of Railroad Labor in the Transportation Problem, 187 Ann. Am. Acad. 88 (1936).

The now extensive history of legislation regulating the relations of railroad employees and employers plainly evidences the awareness of Congress that just and reasonable treatment of railroad employees is not only an essential aid to the maintenance of a service uninterrupted by labor disputes, but that it promotes efficiency, which suffers through loss of employee morale when the demands of justice are ignored. Title 3 of the Transportation Act of 1920[8] which was enacted at the same time as the provisions of § 5(4) (b), set up a "Labor Board" to decide railroad labor disputes involving grievances, rules and working conditions, and declared in § 301 "it shall be the duty of all carriers and their officers and employees and agents, to make every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carriers or employees or subordinate officials." Congress has passed successive measures for arbitration of railroad disputes between railroad employees and employers, all aimed at the prevention of interruptions of railroad service through such disputes, and culminating in the passage of the Railway Labor Act of 1926, 44 Stat. 577, and in its amendments in 1934, 48 Stat. 1185, 45 U. S. C., §§ 151, 163; *Texas & New Orleans Railroad Co.* v. *Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548; *Virginia Railway Co.* v. *Federation*, 300 U. S. 515. By the Wagner Labor Relations Act of 1935, 49 Stat. 449, 29 U. S. C., 151, it recognized and sought to prevent the interference with interstate commerce which may ensue from labor disputes arising in industry not engaged in transportation. See *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 42; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 604.

The Safety Appliance Act of 1893, 27 Stat. 531; see *Southern Railway Co.* v. *United States*, 222 U. S. 20; the Hours of Service Act of 1907, 34 Stat. 1415; see *Baltimore & Ohio R. R. Co.* v. *In-*

[8]This Act resulted from the experiences of the Director-General in operating the railroads during the World War period. Sharfman, The Interstate Commerce Commission, Vol. I, p. 181. The Director-General recognized the necessity of maintaining a loyal and devoted personnel in the interest of uninterrupted service. Thirty-third Annual Report of the Interstate Commerce Commission (1919), p. 4. In agreements executed by the Director-General with several railroad unions, provision was made for protection of seniority rights and for free transportation for the employee, his family and household goods (cf. Clause 3 of order here involved), when consolidations of facilities were ordered by the Director-General. See Agreement between the Director-General of Railroads and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (1920), Rule 77.

terstate Commerce Commission, 221 U. S. 612, and the Federal Employers Liability Act of 1908, 35 Stat. 65; see *Second Employers' Liability Cases*, 223 U. S. 1, 51, were designed mainly to insure the safety and welfare of railroad employees and the constitutionality of those measures was sustained in part on the ground that they fostered the commerce in which the employees were engaged. In passing the Adamson Act of 1916, 39 Stat. 721, fixing the wages of railroad employees, Congress thought that it was safeguarding the railroads of the country from interruption which might result from labor disputes and the constitutionality of the Act was sustained on that ground. *Wilson* v. *New*, 243 U. S. 332, 351. And in the Act of 1934, as amended in 1937, 48 Stat. 1283; 50 Stat. 307, 45 U. S. C., §§ 201, 214, 228(a) to (r), providing for a retirement and pension plan for railroad employees, Congress declared in terms that the plan was adopted for the purpose of "promoting efficiency and safety in interstate transportation."

In the last regular session of Congress, an act to amend the Interstate Commerce Act was passed by the Senate, S 2009, 76th Cong., 1st Sess. The House passed a substitute bill embodying extensive changes. H. Rept. 1217, 76th Cong., 1st Sess. Both bills are now in conference. But both as passed contain a provision carrying into effect the recommendation of the Committee of Six, see S. Rept. 433, 76th Cong., 1st Sess., p. 29, by directing the Commission to require "as a prerequisite to its approval of any proposed transaction [consolidation or lease under § 5(4)(b)] a fair and equitable arrangement to protect the interests of the employees affected." Both bills as enacted declare it "to be the national transportation policy of Congress . . . to encourage fair wages and equitable working conditions, all to the end of developing, coordinating and preserving a national transportation system . . . by . . . rail . . . adequate to meet the needs of the commerce of the United States . . . " Congress has thus declared that fair and equitable provision for the compensation of losses thrown upon employees as the result of an authorized consolidation or lease promotes the national transportation policy by developing, coordinating and preserving the railroad transportation system.

In the light of this record of practical experience and Congressional legislation, we cannot say that the just and reasonable conditions imposed on appellees in this case will not promote the public interest in its statutory meaning by facilitating the national policy

of railroad consolidation; that it will not tend to prevent interruption of interstate commerce through labor disputes growing out of labor grievances, or that it will not promote that efficiency of service which common experience teaches is advanced by the just and reasonable treatment of those who serve. In the light of that record too we do not doubt that Congress, by its choice of the broad language of § 5(4)(b) intended at least to permit the Commission, in authorizing railroad consolidations and leases, to impose upon carriers conditions related, as these are, to the public policy of the Transportation Act to facilitate railroad consolidation, and to promote the adequacy and efficiency of the railroad transportation system.

The fact that a bill has recently been introduced in Congress and approved by both its houses, requiring as a matter of national railway transportation policy the protection of employees such as the Commission has given here, does not militate against this conclusion. Doubts which the Commission at one time entertained but later resolved in favor of its authority to impose the conditions, were followed by the recommendation of the Committee of Six that fair and equitable arrangements for the protection of employees be "required". It was this recommendation which was embodied in the new legislation. Sen. Rep. No. 433, 76th Cong., 1st Sess., p. 29. We think the only effect of this action was to give legislative emphasis to a policy and a practice already recognized by § 5(4)(b) by making the practice mandatory instead of discretionary, as it had been under the earlier act.

It is said that the statute, as we have construed it, is unconstitutional because not within the Congressional power to regulate interstate commerce and is a denial of due process. It is true that in *Railroad Retirement Board* v. *Alton Railroad Company*, 295 U. S. 330, in declaring the Railroad Retirement Act of June 27, 1934, 48 Stat. 1283, not to be a valid regulation of interstate commerce, it was said, among other reasons advanced to support that conclusion, that a compulsory retirement system for railroad employees can have no relation to the promotion of efficiency, economy or safety of railroad operation. But notwithstanding what was said there and even if we were doubtful whether the particular provisions made here for the protection of employees could have the effect which we have indicated upon railroad consolidation and upon the adequacy and efficiency of the railroad transportation

system, we could not say that the Congressional judgment that those conditions have a relation to the public interest as defined by the statute is without rational basis. Cf. *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 189, 191; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 147; *Pitman* v. *Home Owners' Loan Corp.*, No. 10, October Term, 1939, decided November 6, 1939.

If we are right in our conclusion that the statute is a permissible regulation of interstate commerce, the exercise of that power to foster, protect and control the commerce with proper regard for the welfare of those who are immediately concerned in it, as well as the public at large, is undoubted. *Second Employers' Liability Cases, supra*, 47; *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, 478; *United States* v. *Carolene Products Co., supra*, 147; *Mulford* v. *Smith*, 307 U. S. 37. Nor do we perceive any basis for saying that there is a denial of due process by a regulation otherwise permissible, which extends to the carrier a privilege relieving it of the costs of performance of its carrier duties, on condition that the savings be applied in part to compensate the loss to employees occasioned by the exercise of the privilege. That was decided in principle in *Dayton-Goose Creek Railway Company* v. *United States, supra*. There it was held that the Fifth Amendment does not forbid the compulsory application of income, attributable to a privilege enjoyed by a railroad as a result of Commission action, to specified purposes "in the furtherance of the public interest in railroad transportation." § 422 (10), Transportation Act, 41 Stat. 490. Moreover we cannot say that this limited and special application of the principle, fully recognized in our cases sustaining workmen's compensation acts, that a business may be required to carry the burden of employee wastage incident to its operation, infringes due process. *Second Employers' Liability Cases, supra; New York Central R. Co.* v. *White*, 243 U. S. 188; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219; *Cudahy Packing Co.* v. *Paramore*, 263 U. S. 418.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.